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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) CAUSE NO.:
) 1:08-CR-004-SEB/KPF
) Indianapolis, Indiana
-v-) **May 17th, 2010**
) 10:00 a.m.
DALE RUSSELL,)
)
Defendant.)

**Before the Honorable
SARAH EVANS BARKER, JUDGE**

OFFICIAL REPORTER'S TRANSCRIPT OF
SENTENCING HEARING

Court Reporter: Laura Howie-Walters, CSR, RPR
Official Court Reporter
United States District Court
46 E. Ohio Street
Room 217
Indianapolis, Indiana 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
TRANSCRIPT PRODUCED BY ECLIPSE NT COMPUTER-AIDED TRANSCRIPTION

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1 (Open court.)

2 THE COURT: Good afternoon, all. You may be seated.
3 Counsel, nice to see you all of you.

4 MR. COOK: Nice to see you, Your Honor.

5 THE COURT: Miss Schneeman, call the matter before
6 the Court, please.

7 (Call to order of the Court)

8 THE COURT: This matter's on the Court's calendar
9 for sentencing today following the jury's verdict on
10 March 3rd, 2010, in which the verdict concluded that the
11 defendant was guilty of the four counts of production of child
12 pornography as alleged against him in the indictment.
13 Following that trial and the receipt of the jury's verdict, we
14 assigned the matter to the Probation Department for
15 preparation of a Presentence Investigation Report.

16 Miss Fitzgerald drew that assignment, and has
17 prepared a report. Mr. Schoettmer is here to assist the court
18 as the probation officer today, so we will use that report now
19 and move ahead with this sentencing hearing that will
20 hopefully, and I expect it to, position the Court to have the
21 requisite understanding to impose -- to determine and impose a
22 reasonable sentence.

23 So Ms. Cook, Mr. McKinley, are you going to come to
24 the podium?

25 MR. MCKINLEY: I will, Your Honor, if I may.

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1 THE COURT: Then, Counsel, will you escort
2 Mr. Russell to the podium, please.

3 MS. COOK: Yes, Your Honor.

4 THE COURT: Good afternoon, sir. I remember you
5 from the trial, but I need to establish for the record that
6 you are Dale Russell, the same person who is named in this
7 cause that was just called by the Clerk?

8 THE DEFENDANT: Yes, I am.

9 THE COURT: How old are you now, Mr. Russell?

10 THE DEFENDANT: I'm 48.

11 THE COURT: You need to speak into that mic so the
12 court reporter can hear you.

13 48?

14 THE DEFENDANT: Yes.

15 THE COURT: I know you can read and write the
16 English language?

17 THE DEFENDANT: Yes.

18 THE COURT: Prior to coming to the court today, I
19 know as well that you've been in custody, but have you
20 consumed any substance, alcohol, medicine or narcotic, that
21 would interfere with your ability to understand and
22 participate in this trial -- this hearing, I'm sorry?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: Are you under the care of a doctor for
25 any condition that might interfere?

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1 THE DEFENDANT: No.

2 THE COURT: As I mentioned preliminarily, following
3 your conviction of these four counts, the probation office
4 prepared a Presentence Investigation Report to present in that
5 format the issues that the Court must consider in imposing a
6 reasonable sentence today. So let me just ask you some
7 preliminary questions about the report.

8 First of all, did you read it?

9 THE DEFENDANT: Yes, I did.

10 THE COURT: And did you have sufficient time to read
11 it and review it with Ms. Cook or Mr. McKinley?

12 THE DEFENDANT: Yes.

13 THE COURT: Miss Cook, have you had sufficient time
14 to review the report and consult with Mr. Russell?

15 THE DEFENDANT: Yes, Your Honor, I have.

16 THE COURT: Mr. McKinley, I inquire of you
17 separately, too, or have you also read the report?

18 MR. MCKINLEY: I have read the report, yes, Your
19 Honor.

20 THE COURT: Miss Helart, have you or Mr. Brant Cook,
21 have you had sufficient time to review the report and prepare
22 for the hearing today?

23 MR. COOK: Your Honor, both myself and Ms. Helart
24 have had sufficient time.

25 THE COURT: Okay. Let me just highlight a couple of

1 things about the report so that you grasp these. Having read
2 it I suspect you've noticed this, but I want to make sure for
3 the record you've noticed it.

4 The report consists of two kinds of information,
5 Mr. Russell. One part has to do with you in a personal way.
6 It's a biographical summary of you and your life, your
7 education, your health, your work history, your family, that
8 sort of thing.

9 The other part of the report has to do with these
10 offenses that you've been found guilty of, and how the
11 sentencing guidelines apply to calculate the sentencing ranges
12 and the sentencing considerations.

13 So did you notice that about the report, it has
14 these two kinds of information?

15 THE DEFENDANT: Yes, I did.

16 THE COURT: This is a document that is tailor-made
17 to you in these circumstances. There are a few other uses
18 that can be made of it by the courts and by the Bureau of
19 Prisons, by the probation office, but they're basically
20 limited to those.

21 It is kept in the court's records under seal, we
22 say, which means that it's kept in a confidential status and
23 it's not available to the public or to the media simply upon
24 request by them. So you don't need to worry about it getting
25 out in that way or some unauthorized way. It will be used

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1 only for the limited official uses that it is authorized for
2 use; do you understand that, sir?

3 THE DEFENDANT: Yes.

4 THE COURT: Besides the report itself, I have the
5 written memorandum, one which was filed by Ms. Cook on your
6 behalf, but also a submission by the Government. These are
7 official filings in the court file, and I also have some
8 victim statements that have been supplied and I've read those
9 as well.

10 Did you get copies of those statements?

11 MS. COOK: Yes, Your Honor.

12 THE COURT: So that Mr. Russell had an opportunity
13 to read them as well?

14 MS. COOK: I believe he's had an opportunity. Have
15 you read all of them?

16 THE DEFENDANT: Yes, I believe so.

17 THE COURT: There are five of them.

18 MS. COOK: Yes, we just got them in the courtroom.

19 THE COURT: Yes, I just got them myself, but you did
20 read them, and you had an opportunity to read all of them, did
21 you?

22 THE DEFENDANT: Yes, I did.

23 THE COURT: Now, beside what I've mentioned here,
24 the things that are in the court's file and these filings by
25 interested parties and victims of these offenses, nothing else

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1 has come to me that I've withheld from you. So there have
2 been no other letters or no other communications, no e-mails,
3 no telephone conferences with the lawyers. Sometimes I have
4 to do that to get a case moving procedurally, but we didn't
5 have to do that here. So you know everything that I know of a
6 factual nature on the basis of which I'll make a sentencing
7 decision today.

8 Do you understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: Now, there's partial exception to that.
11 It's only a partial exception. And that is the probation
12 officer has prepared a memo to me to assist me in fashioning a
13 sentence so that the sentence covers all the appropriate
14 bases, and properly takes into account the legal
15 considerations.

16 That memo from the probation officer to me doesn't
17 have any new facts. It relates to the facts in the report.
18 And it, as I said, is intended to be of assistance to me as
19 the sentencing judge. And that memo's not disclosed to anyone
20 else because it's confidential between the probation officer
21 and the sentencing judge.

22 So that's the only thing I have that hasn't been
23 available to everyone else. Do you understand that, sir?

24 THE DEFENDANT: Yes.

25 THE COURT: Now, you can tell from reading the

1 report, the Presentence Investigation Report, that we go
2 through a sentencing guideline determination. And we use that
3 determination after we're confident that it reflects a correct
4 application of the law to the facts of your case, to inform
5 the decision that the Court has to make as to a reasonable
6 sentence.

7 So the guideline computation's not binding on the
8 Court as such. I'm not obligated to make the calculations and
9 give a sentence that is precisely called for under the
10 guidelines. The statute does limit my discretion. I can't go
11 outside the statutory limits. And I'll tell you about those
12 in just a minute.

13 But with respect to the sentencing guidelines, after
14 we've made that computation, then we ask one more question.
15 We say okay, that's how the guidelines work, but is that a
16 reasonable sentence, because my obligation is to impose a
17 reasonable sentence under the law and under the facts of your
18 case.

19 So that's what we're going to be doing. We're
20 headed for that point. Reasonable is a concept that's defined
21 by law. It's not just if it seems right to me. Of course, if
22 it didn't seem right to me, I wouldn't do it, but I am bound
23 by what the statute requires, and that will be the measure of
24 a reasonable sentence. And the criteria for a reasonable
25 sentence are set out in a statute that I assume Ms. Cook and

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1 Mr. McKinley have run by you and discussed with you that the
2 lawyers and I refer to as Section 3553(a) of Title 18, and if
3 you've read those -- have you?

4 THE DEFENDANT: I looked over them, yes.

5 THE COURT: Those seven factors are the factors that
6 the Court will be using as I'm listening to the evidence and
7 trying to decide what a reasonable sentence is. And to the
8 extent that I succeed in folding those factors into the final
9 decision, it will be deemed legally reasonable. So that's
10 what we're going to do today and that's where we're headed.
11 Do you understand that, sir?

12 THE DEFENDANT: Yes.

13 THE COURT: Now under the guidelines, as they've
14 been calculated in the report, you have a total offense level
15 of 49, and a criminal history category of 1. The upshot of
16 that is under the guidelines, the guideline sentence for the
17 period of incarceration would be life imprisonment.

18 Under the probation provision of the guideline
19 sentence, you would not be eligible for that. For supervised
20 release, which is a period of supervision following
21 incarceration, if that should be appropriate, that also is a
22 life term under the guidelines.

23 The fine range is \$25,000 on the low end up to
24 \$250,000 on the high end. Restitution doesn't apply here.
25 There is a special assessment of \$400, which is a fee payable

1 to the Clerk. And that's a mandatory fee, I can't waive that,
2 so that will be part of any sentence that's imposed.

3 Those are the guidelines as set out in the
4 presentence report. Ms. Cook has raised various issues, and
5 we're going to resolve those, but that's our starting point
6 for the guideline determination.

7 Do you understand that, sir?

8 THE DEFENDANT: Yes, I do, Your Honor.

9 THE COURT: Do you understand how we got to those
10 guideline ranges?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: We go to the sentencing table. When we
13 have the offense level and the criminal history category, we
14 go right down there and it gives us the range of sentence.

15 Is that how you understood it, sir?

16 THE DEFENDANT: Yes.

17 THE COURT: Now, let's take up the objections
18 because there have been a few that require the Court to rule.
19 According to the addendum, Mr. Cook, the Government has no
20 objections; is that your position?

21 MR. COOK: That is, Your Honor.

22 THE COURT: So let's move through the defense
23 objections. Some of your objections have to do with your
24 disagreement with the evidence and the theories that the jury
25 resolved. So the Court in those respects will just rely on

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1 the jury verdict, even though your position is noted of
2 record.

3 That has to do with -- that's Objection No. 1, your
4 objection to the offense conduct. So I won't rule on that
5 further.

6 And the same with Objection 2?

7 MS. COOK: Yes, Your Honor.

8 THE COURT: Okay.

9 MS. COOK: My objection was just for the purpose of
10 memorializing Mr. Russell's position where he had interposed a
11 plea of not guilty and asserted that his conduct did not
12 constitute a criminal offense.

13 THE COURT: Okay, the Objection No. 3 has to do with
14 the acceptance of responsibility provision of the guidelines.
15 The probation officer withheld that credit or that benefit
16 because the defendant did not truthfully admit all the
17 elements of the trial -- I mean, of the charges against him
18 that went to trial.

19 He admitted part of it, that he took the
20 photographs, but he denied that he sexually exploited the
21 victims by creating child pornography, and thus he did not
22 admit the conduct comprising the offense of conviction.

23 Your view is that he relied on a legal defense
24 claiming that the photographs did not constitute pornography,
25 and that he ought to be given the acceptance of responsibility

1 credit. Do I have your reason properly framed there?

2 MS. COOK: Yes, Your Honor, and I would like to
3 expound on that just briefly.

4 THE COURT: You may.

5 MS. COOK: As the Court knows, it has discretion in
6 the application of 3E1.1, both because of the advisory nature
7 of the guidelines generally and because this particular
8 adjustment has provisions in it that allow the Court to make a
9 determination with respect to providing acceptance of
10 responsibility points, even for defendants who opt to proceed
11 with trial.

12 While we certainly concede that the downward
13 adjustment in 3E1.1 isn't intended to apply to a defendant who
14 puts the Government to its burden of proof by denying the
15 factual elements of the guilt, of his or her guilt, the fact
16 that a defendant opts to proceed with a trial doesn't
17 automatically preclude that defendant from consideration for
18 an acceptance of responsibility reduction.

19 The guideline itself notes that there are rare
20 situations in which a defendant can demonstrate an acceptance
21 of responsibility for his criminal conduct, even though he
22 exercises the constitutional right to a trial. The examples
23 that are given in the guidelines are where a defendant goes to
24 trial to assert and preserve issues that don't relate to
25 factual guilt; for example, raising a constitutional challenge

1 to a statute or a challenge to the applicability of a statute
2 to his conduct. And it's the latter situation that
3 Mr. Russell finds himself in.

4 During the course of this trial and the pretrial
5 proceedings, Mr. Russell admitted the factual allegation that
6 he had created the photographs in question. And by our
7 opening statement, the defense also acknowledged the fact that
8 those photographs had moved in interstate commerce.

9 What he denied during the trial was that the
10 photographs and the subject matter of the photographs
11 constituted pornography as defined in the statute, but our
12 position, as the Court knows, was that they did not constitute
13 a lascivious display of the genitalia of a minor child and
14 therefore did not constitute sexual conduct as defined in the
15 statute.

16 Mr. Russell's position, therefore, is analogous to
17 proceeding to trial for the sole purpose of challenging the
18 applicability of the statute to the conduct which he admitted.

19 The Government's response, which was set forth in a
20 brief that I received yesterday, indicated that their position
21 with respect to acceptance of responsibility was that
22 Mr. Russell was undeserving of that reduction because the
23 Government, in putting on its case at trial, had to call the
24 minor children as witnesses at trial to discuss the production
25 of the images, and we would strongly disagree with that.

1 There was nothing in the minor child's testimony
2 that was necessary for the Government's burden of proof given
3 the fact that Mr. Russell never denied having created the
4 photographs. The issue that was left for the jury was not
5 whether he produced the photographs, but the issue for the
6 jury was whether those photographs depicted sexual conduct or
7 a lascivious display as defined by the statute.

8 The minor who testified could not address that issue
9 and in fact did not address that issue. So there was no basis
10 for the Government's position that they had to call a witness
11 on that point. There was nothing to rebut at that point.

12 The Hendricks case, which was cited by the
13 Government in support of their position that Mr. Russell was
14 not entitled to acceptance of responsibility points, was a
15 firearms case where the defendant in that case was charged
16 with possession of a firearm. He opted to go to trial, and
17 the defense at trial was "although I possessed the firearm, I
18 didn't knowingly do so."

19 That's a far cry from Mr. Russell's position at
20 trial where his position was "I produced the photographs, I
21 intended to produce the photographs, but they did not
22 constitute pornography as defined by the statute," which would
23 be analogous to the Hendricks defendant saying "I possessed
24 the gun, I intended to possess the gun" or "I possessed the
25 item and intended to possess it, but it wasn't in fact a

1 firearm."

2 So I think the case that was cited is not pertinent
3 to the situation here. We believe this is one of those
4 exceptional cases where Mr. Russell went to trial to assert
5 and to preserve an issue which was a technical, legal issue
6 unrelated to the facts and the elements of the offense.

7 We think that, based upon the fact that he admitted
8 taking the photographs and intending to take the photographs,
9 but contested only whether those photographs legally
10 constituted pornography, that he's entitled to two levels off
11 for acceptance of responsibility.

12 THE COURT: Mr. Cook, I'll hear the Government's
13 view.

14 MR. COOK: Thank you, Your Honor.

15 As Ms. Cook noted, we did file a response to the
16 defense's written submission. I would point the Court to that
17 response, and add just a couple more points, that quite
18 frankly, what this comes down to is that an essential element
19 of the offense, that the defendant used or induced minors to
20 engage in sexually-explicit conduct, was put at issue in this
21 trial.

22 That's an essential element of the offense. The
23 argument could be made that is the most important element of
24 the offense. The testimony of the minors went directly to
25 that because they had to testify at length about the context

1 in which these photos were taken. The context of their father
2 convincing them that they -- that nudity was part of a
3 lifestyle; the context of their father requiring them to keep
4 things secret from their mother; quite frankly, it was an
5 essential element of the offense.

6 The Government was required to call witnesses to
7 rebut that, and we did. And the jury found him guilty of
8 those offenses in finding that he had violated an essential
9 element.

10 THE COURT: I agree with the Government's view of
11 the defendant's entitlement to an acceptance of responsibility
12 benefit. He accepted partial responsibility, I guess we could
13 say, but he left a major matter for the jury to resolve, and
14 it required enough evidence and enough proceedings that we had
15 to have the trial extended over some couple of days, as I
16 recall, perhaps three, although I don't have perfect recall on
17 that; but it was not a matter that was insignificant.

18 It was, in fact, at the heart of this case partly
19 because the evidence was overwhelmingly convincing as to the
20 other elements that he conceded, but as to the nature of the
21 materials, I share the Government's view that it was
22 important, in fact essential, to their ability to prove that
23 element beyond a reasonable doubt, which they had to do, to
24 call the victims to explain the circumstances surrounding the
25 creation of those photographs that were the gravamen of each

1 of the four counts.

2 The guidelines permit a benefit to the defendant or
3 a defendant who basically demonstrates an acceptance of
4 responsibility by owning up to what happened and saving the
5 Government the cost of the further investigation and
6 preparation for trial and so forth. None of those things
7 occurred here because we had to go to trial on that very
8 important matter that was left unadmitted to.

9 So in terms of the defendant's truthful admission of
10 the conduct comprising the offense of conviction, he went part
11 way down the road, but not all way. And as I said, the part
12 that was left undone was a portion of the case that required
13 quite a lot of evidence and quite a lot of argument to the
14 jury to explain to them the law and to convince them of the
15 strength of the Government's case so that they could find
16 beyond a reasonable doubt that the defendant was guilty of the
17 four charges.

18 So the defendant simply is not entitled to an
19 acceptance of responsibility benefit recognizing it to be a
20 benefit, a reward or an acknowledgment of that acceptance. It
21 just didn't happen here. So I'll overrule that objection.

22 The next objection is interposed in the -- or is
23 referenced in the addendum as Defense Objection 4, and it has
24 to do with the issue of the Government's case with respect to
25 proving that the defendant knowingly or intentionally

1 distributed the charged photographs.

2 The defendant conceded -- I'm paraphrasing now, this
3 is not what was in your objection, but the defendant conceded
4 that the photographs that had been placed into the computer
5 network wound up in Canada, discovered on a Canadian
6 offender's computer, but the defense view is that Mr. Russell
7 did not knowingly cause the photographs to be distributed.

8 So do you want to elaborate on that further?

9 MS. COOK: Yes, Your Honor, if I may. Our position
10 is that there is a complete lack of evidence that Mr. Russell
11 knowingly or intentionally distributed the photographs in
12 question.

13 It appears to be the Government's position, first,
14 that Mr. Russell may have distributed photographs constituting
15 pornography by posting them on the modeling websites about
16 which there was testimony during trial.

17 However, there were no photographs that were
18 introduced into evidence during the trial that constituted
19 pornography and came from the modeling website.

20 The initial report which was made concerning the
21 existence of the modeling websites was investigated by, I
22 believe, the Carmel Police Department, which received some
23 notification and came to the girl's school. And at the point
24 when --

25 THE COURT: I thought it was Greenfield.

1 MS. COOK: I don't remember. It may have been
2 Greenfield.

3 But a report came to the girl's school at a time
4 prior to Mr. Russell receiving any notification that there was
5 an investigation.

6 When those modeling websites were examined, there
7 were no photographs on there that constituted pornography.
8 And we've never had any evidence that would indicate that any
9 of the images which are allegedly pornographic and which were
10 found in collections across the country about which I think
11 the Government is going to present some evidence later this
12 afternoon, we've never heard that any of those images came off
13 of the modeling websites. I think, at most, the images that
14 came from the modeling websites were -- could be characterized
15 as erotica.

16 I do recognize that one of the minors who testified
17 during trial indicated that she believed she had seen a
18 photograph of herself unclothed on the modeling website, but I
19 would suggest to the Court that given the passage of time,
20 it's extremely unlikely that that was accurate, particularly
21 given the fact that there has not been any documentation of
22 allegedly pornographic images coming off of those websites
23 either in terms of --

24 THE COURT: What was discovered on the Canadian
25 offender's computer?

1 MS. COOK: There were images that the Government
2 contends were pornographic, but they did not --

3 THE COURT: Were they these four that were being
4 tried?

5 MS. COOK: Yes.

6 THE COURT: So these four that were the subject
7 matter of the charges here --

8 MS. COOK: Yes.

9 THE COURT: -- were found to be on a computer in
10 Canada in possession of somebody, we don't know who?

11 MS. COOK: Yes, Your Honor. And I'm going to get to
12 that point in just a minute.

13 My initial point was that I don't believe there's
14 been sufficient evidence or any credible evidence that would
15 indicate that there were any pornographic images on the
16 modeling websites.

17 The second issue are the images which were
18 introduced at trial --

19 THE COURT: So just let me see if I -- I can't tell
20 in your argument if you're maintaining the defense that these
21 were not illegal photos. I'll just say it that way instead of
22 using the words of the statute.

23 Are you simply holding to the defendant's version of
24 guilt, that is to say he's not guilty, or are you telling me
25 something else about these particular pictures?

1 MS. COOK: I'm saying that even with respect to the
2 Government's argument, there's been no evidence that the
3 photographs on the modeling websites were illegal photographs.

4 THE COURT: Were these four on the modeling?

5 MS. COOK: No, but the photographs from the modeling
6 websites are referenced both in the response to my objection.
7 And so I'm addressing that response to my objection.

8 Now I'm moving to the issue of the photographs which
9 were in evidence which formed the basis for the four counts of
10 which Mr. Russell was convicted. With respect to those
11 photographs, we do know that they moved in interstate
12 commerce, but Mr. Russell has always denied that he
13 distributed them in any fashion or caused them to move in
14 interstate commerce or did so knowingly or intentionally.

15 It's our understanding based upon representations
16 made by the agents, and at least partially contained in one of
17 the reports that we received, that these photographs were
18 recovered from an individual by the name of Doug DuBois who
19 was an acquaintance of Mr. Russell, who said that Mr. Russell
20 had provided to him, given to him a box that had materials in
21 it; given that to him for safekeeping, not for his review, not
22 for his viewing, but for safekeeping at a time when the
23 parties were engaged in some civil litigation; that Mr. DuBois
24 then opened the box, looked at the materials in the box,
25 copied them and distributed them, and then returned the box to

1 Mr. Russell.

2 So our position is that Mr. Russell never had the
3 intent to distribute these materials or to cause them to be
4 distributed in any fashion. So we believe that because he
5 didn't do so, that he should not receive the two-level
6 enhancement for distribution.

7 THE COURT: Mr. Cook?

8 MR. COOK: Thank you, Your Honor.

9 THE COURT: Do you wish to introduce evidence on
10 this?

11 MR. COOK: I am prepared to present more evidence if
12 the Court's ready to hear it. I can also argue first and then
13 present that evidence. What's the Court's --

14 THE COURT: Well, usually we present evidence and
15 then argue in my experience.

16 MR. COOK: I'm sorry, there's certain responses to
17 Ms. Cook and also our evidence. Why don't we present the
18 evidence that the Court is ready to hear?

19 THE COURT: All right. Are you calling a witness
20 for that?

21 MR. COOK: Yes, the Government would call Senior
22 Special Agent Michael Johnson.

23 THE COURT: Would you have a seat over there,
24 please, Ms. Cook and Mr. Russell.

25 Good afternoon, sir.

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1 THE WITNESS: Good afternoon, Your Honor.

2 THE COURT: Will you be sworn please.

3 **MICHAEL JOHNSON, PLAINTIFF'S WITNESS, SWORN**

4 **DIRECT EXAMINATION**

5 THE COURT: You may be seated.

6 THE WITNESS: Thank you, Judge.

7 BY MR. COOK:

8 Q Please state your name for the record.

9 A Michael Johnson.

10 Q And what do you do for a living, sir?

11 A I'm a Special Agent with the United States Immigration and
12 Customs Enforcement.

13 Q And what are your duties with that agency, sir?

14 A I am assigned to investigate cyber crimes, and I am a
15 digital forensics examiner.

16 Q And does that mean that, at times, you have investigated
17 the production of sexually-explicit images of minors?

18 A Yes, sir, I have.

19 Q As part of your duties with the Department of Homeland
20 Security and the Customs Division, have you had contact with
21 an organization called the National Center for Missing and
22 Exploited Children?

23 A I have, sir.

24 Q What is that? What is the National Center?

25 A With respect to these cases, the National Center for

1 Missing and Exploited Children is a clearinghouse, if you
2 will, of the child pornography images that are recovered in
3 child exploitation investigations across the country. They
4 maintain the clearinghouse. As we work investigations and
5 recover images, we submit those images to the National Center
6 for Missing and Exploited Children.

7 At that time, they're able to tell us if there are
8 known victims involved in the cases. And then that assists us
9 in victim notification and things of that nature. And then if
10 they are not known victims, then those are placed in that
11 clearinghouse, and then we begin the task of attempting to
12 locate those victims.

13 Q Now that "clearinghouse," does the National Center I
14 suppose partition its database at all to provide law
15 enforcement opportunity to sort these things through? In
16 other words, do they create series of child pornography images
17 to assist law enforcement?

18 A Yes, sir, when a group of pictures are submitted and it is
19 determined that there are a series of victims, those victims
20 are then -- that series is then kept to itself under a series
21 name, and that's how they're identified from that point
22 forward.

23 Q Special Agent Johnson, are you familiar with a series
24 maintained by the National Center for Missing and Exploited
25 Children, I refer to it as the Ballet Girl series?

1 A Yes, sir, I am.

2 Q What is it the Ballet Girl series?

3 A The Ballet Girl series is a series of pictures that are
4 the pictures relative to the charges in this case.

5 Q And you are familiar with the two named victims in this
6 case?

7 A I am, sir.

8 Q And that Ballet Girls series depicts them; is that
9 correct?

10 A Yes.

11 Q Special Agent Johnson, you're also familiar with the
12 images that were charged in the present case; is that correct?

13 A Yes, sir.

14 Q You examined those images for ExIf data; is that right?

15 A That is correct.

16 Q And those images that were charged in this case, are those
17 part of the Ballet Girl series as --

18 A They are.

19 Q -- identified by the National Center?

20 A Yes.

21 Q In preparation for the sentencing today, did you contact
22 the National Center requesting reports about the Ballet Girls
23 series?

24 A Yes, sir, through my agency's liaison at the National
25 Center.

JOHNSON - DIRECT/COOK

28

1 Q And what was nature of the report that you requested?

2 A The report told me that between May of 2006 and Friday's
3 date, the National Center for Missing and Exploited --

4 THE COURT: This past Friday?

5 THE WITNESS: Yes, ma'am.

6 THE COURT: Which would be May --

7 THE WITNESS: 14th, Judge.

8 A The National Center for Missing and Exploited Children had
9 received submissions of images from the ballet series 1,567
10 times from all states in the United States with the exception
11 of Wyoming, as well as submissions from the countries of
12 Canada and France.

13 Q Your understanding is that each submission effectively, at
14 a separate time, was discovered on a separate offender's
15 computer; is that correct?

16 COURT REPORTER: Could you repeat that slower,
17 please?

18 MR. COOK: Sure.

19 BY MR. COOK:

20 Q It's your understanding, Special Agent Johnson --

21 THE COURT: That's not any slower.

22 BY MR. COOK:

23 Q Your understanding, Special Agent Johnson, is that each
24 submission represents a separate offender?

25 A Each submission, I believe, sir, represents a separate

1 case, yes.

2 MR. COOK: No further questions, Your Honor.

3 THE COURT: All right. Cross-examine?

4 **CROSS EXAMINATION**

5 BY MS. COOK:

6 Q Agent Johnson, with respect to the distribution of these
7 photographs in the Ballet Girl series, you were not able to
8 determine that any of those photographs were sent from a
9 computer operated by Mr. Russell, were you?

10 A No, ma'am.

11 Q And with respect to the Ballet Girl series, none of those
12 photographs appear to have come from the modeling websites
13 that Mr. Russell created, did they?

14 A I would not be able to tell, ma'am.

15 Q Are you familiar with Mr. Douglas DuBois?

16 A No, ma'am, I am not.

17 Q Have you been made aware of his involvement in the
18 investigation of this case?

19 A No, ma'am, I am not aware.

20 Q You don't have any evidence to the effect that Mr. Russell
21 himself caused any of these photographs to be e-mailed or
22 posted on the Internet or sent to other individuals, do you?

23 A I do not, ma'am.

24 MS. COOK: I have no further questions.

25 THE COURT: Redirect?

Cross-examination Ms. Cook. 30

1 MR. COOK: Could I have a moment with co-counsel,
2 Your Honor?

3 THE COURT: Yes.

4 MR. COOK: Thank you.

5 (Off-the-record discussion.)

6 MR. COOK: Your Honor, the Government has no further
7 questions for this witness.

8 THE COURT: All right.

9 MR. COOK: If we may, we do have an additional
10 witness given what defense argument was, if the Court will
11 hear from him now.

12 THE COURT: All right. Sir, you may step down,
13 Agent Johnson. Watch your step as you go.

14 MR. COOK: The Government would call Detective Andy
15 Byers.

16 THE COURT: Come to the witness stand, sir. Good
17 afternoon.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: Remain standing and be sworn by the
20 Clerk.

21 **ANDY BYERS, PLAINTIFF'S WITNESS, SWORN**

22 **DIRECT EXAMINATION**

23 THE COURT: You may be seated.

24 THE WITNESS: Thank you.

25 BY MS. HELART:

1 Q Good afternoon, Detective Byers.

2 A Good afternoon.

3 Q I see that you're dressed in a more casual way than a
4 uniform or suit. Were you expecting to testify today?

5 A No, I was not.

6 Q All right. Were you part of the investigation team and
7 are you part of the audience today in this Dale Russell
8 sentencing?

9 A That is correct.

10 Q And did you just hear the defense argue about Doug DuBois
11 and his part in this case?

12 A Yes, I did.

13 Q Have you been involved in this case since approximately
14 2004?

15 A That is correct.

16 Q Do you know the name Doug DuBois?

17 A Yes, I do.

18 Q Who is he to this investigation?

19 A In the early stages of this investigation, I was contacted
20 by ICE agents up in Michigan, up in the Grand Rapids office,
21 and they had been investigating a subject by the name of Doug
22 DuBois, or Dubois (phonetic).

23 And during the course of their investigation, they
24 recovered a significant amount of photos from this, which was
25 later termed Ballet Girl series, including images that are

1 charged in this investigation, in this hearing.

2 During their initial interviews with DuBois, he made
3 statements about his relationship with Dale Russell, and
4 that's how he came to be in possession of those images of the
5 girls, of the victims.

6 Q How did Mr. DuBois that he came into possession of the
7 Jane Doe 1 and 2 victims?

8 A During -- at a later point in time, I went up to Michigan,
9 and I sat in on a proffer and interviewed him myself in
10 person. And during that time, he told me that he was friends
11 with Dale Russell, had traveled, gone on vacations with Dale
12 Russell, and at some point in time, Dale Russell had sent him
13 a box full of articles, including hard drives and CDs and a
14 video tape that he -- his statement was Dale told him to hang
15 onto them for safekeeping, and he would get them -- ask for
16 them back at a later date. DuBois, during the course of the
17 time he was in possession of those, got into the box and
18 reviewed the items that were there.

19 Q Did he readily admit that he got into the box and reviewed
20 them?

21 A Yes, he did.

22 Q What did he say about why he did that?

23 A He stated it was just pure curiosity.

24 Q Did he have a relationship with Mr. Russell based on the
25 Internet first?

1 A Yes.

2 Q How did that first start?

3 A As Mr. Russell has talked about, he's had -- was running
4 teen modeling websites and preteen modeling websites. Doug
5 DuBois was also running similar websites. And DuBois stated
6 that he made initial contact with Dale as he did with many
7 other webmasters, if you will, who were running similar type
8 sites.

9 Part of the conversations were initiated with
10 e-mails, commenting on the content, as well as asking for
11 different recommendations on the financial aspect and kind of
12 the go-between for the pay service.

13 Q Did he make it clear that it was difficult for people who
14 were running websites involving this kind of material to find
15 an honest service that would take their credit cards and
16 actually give them back their money?

17 A That is correct, and that was a common problem.

18 Q Did they often run the content of pictures by each other
19 to see what each other thought?

20 A According to DuBois, yes, they did, that was a common
21 practice.

22 Q Did DuBois talk about why he, DuBois, first made contact
23 with Dale Russell in terms of liking his material?

24 A That was exactly what he said. He liked his material and
25 was interested because at that time, he told me that

1 Mr. Russell was running more than 10 different websites, had
2 various different models and he was just inquiring about the
3 nature of the different models and who they were and how he
4 was gaining access to these different photographs.

5 Q And when you were speaking with Mr. DuBois -- and the
6 spelling is that is D-U, capital B, -O-I-S?

7 A That's correct.

8 Q When you were speaking with him, what is the content that
9 you and he spoke of? What are we talking about?

10 A He said that most of what they were trying to do, they
11 meaning the other webmasters that he was in contact with, the
12 same as Mr. Russell, was what they called -- termed "implied
13 nudes" which is often children who are mostly female, some
14 males, but mostly female were nude, partially nude, genitalia
15 partially covered, sometimes see-through. And part of what
16 they would do is send images that they were in question about
17 back and forth to each other to kind of check and, "Do you
18 think I can get away with this," basically; "Is this a little
19 over the line, is this going to get me in trouble?" So they
20 were kind of self-checking to see, but in the course of that,
21 they were sending private collections as well. This is for
22 you, this is not for post.

23 Q Do you have a sense of the timing that if Mr. DuBois's
24 timing was accurate when Dale Russell sent him the material
25 to -- to hang onto?

1 A Yes, and the time frame he gave was during the civil
2 litigation, during the divorce hearings and custody issues
3 that was going on. And that was when I was initially involved
4 in the case in the fall of, I believe it was 2004, I believe,
5 when I first became aware of the complaint from the Carmel
6 Police Department investigation.

7 THE COURT: It was Carmel; is that right?

8 THE WITNESS: Yes.

9 BY MS. HELART:

10 Q We do have two police departments referred to, though.
11 Was Greenfield Police Department the police department that
12 first notified Mrs. Russell?

13 A That is correct.

14 Q Then how did Carmel become involved, and how did you
15 become involved with Carmel?

16 A Carmel was involved because that was the town or the place
17 where Mr. Russell was living. And that's where the computer
18 and all the information was residing there. So the mother and
19 the victims were living in Greenfield. So then, thus the two
20 different police departments were initially involved.

21 I was contacted by the FBI. Carmel Police
22 Department called the FBI and asked for help. They got their
23 call and asked for my assistance as well, and that's how I got
24 there. The point they really needed help with was trying to
25 gain access to the websites to view the content of

1 Mr. Russell's websites.

2 Q And that's the point that maybe Ms. Cook was trying to
3 make was when Carmel was looking at the websites, they
4 couldn't find anything, but at that point, the Court had
5 ordered them to take them down?

6 A That is correct. The Court, through the records that I
7 read and the information I had at the time, we knew that
8 possibly we were not going to find any content on there
9 because the Court had actually -- the judge in that civil case
10 had actually ordered Mr. Russell to take down any images or
11 take down the websites of the victims in this case.

12 Q In this case, you knew about the significant date of
13 October 19, 2004?

14 A Yes.

15 Q And that was the date that Dawn Russell first went into
16 court on an emergency hearing because she had first discovered
17 this within a week from the Greenfield Police Department?

18 A That is correct.

19 Q So if it is consistent that that's about -- or after that
20 time period was about when Mr. Russell sent the material, the
21 box, to Mr. DuBois, the investigation might have been heating
22 up?

23 A That is correct.

24 Q And so Mr. DuBois, going back to that part of the story,
25 stated he was curious. What else did he state, that he really

1 wanted to get in that box?

2 A Correct, he wanted to get in there and look because he
3 knew that he had been in contact with Mr. Russell. Also, he
4 had made mention that he had been on vacation with Mr. Russell
5 down in Florida where he had taken several -- he was a part of
6 assisting Dale Russell take nude photographs of the victims in
7 this case. So he had an interest of were those pictures going
8 to be there that he was actually a witness to.

9 Q So with respect to that aspect of Mr. Dubois's story, what
10 did he say, Mr. DuBois, about his part in going on vacation
11 and having seen Mr. Russell taking nude photographs of his
12 children?

13 A He said that was -- he came down, was kind of like a
14 family friend, went on vacation with them, went to a couple
15 different beaches. He stated at one beach in particular, it
16 wasn't a nude beach per se, but they were there early in the
17 morning, like 7:00, 7:30 something like that. To his best
18 recollection, Mr. DuBois's, that it was really before anyone
19 else got there, and he was kind of holding a reflector and
20 things like that. He kind of complained. Mr. DuBois is
21 somewhat infirm and walks with a cane, so he continued to tell
22 the story of how he was complaining that he had to carry all
23 the cameras and equipment and have his cane and walk through
24 the sand.

25 So once he kind of got things set up and was there

1 for -- observed Mr. Russell take a few photographs on the
2 first camera. And then according to Mr. DuBois, Dale Russell
3 took the camera and the girls and went down closer to the
4 water and took several more photos because Mr. DuBois wasn't
5 capable of following them that far.

6 Q Did Mr. DuBois get a set of these nude photographs?

7 A No, he did not.

8 Q Did he express any emotion about that?

9 A Yes, he was disappointed.

10 Q Can you explain?

11 A He was disappointed that he put forth the effort and was
12 there on the trip with them and felt that he should have got
13 his copy or at least been able to view them.

14 So when I interviewed him, that was kind of his
15 reasoning why he felt he had a right to look in the box and
16 look for the different items to see if those were there.

17 Q Did he see anything significant in the box?

18 A Yes, he did.

19 Q This was the box he had received from Mr. Russell?

20 A Correct.

21 Q And what did he see in the box?

22 A He said he had a video tape that had showed Mr. Russell
23 and the victims at the gym that was in Carmel. He also -- he,
24 DuBois -- stated he was there at the gym during the first part
25 of that photo session before the victims were told to remove

1 their clothes or instructed to remove their clothes.

2 He left the gym at that time, and all that stuff
3 happened after he was told by Mr. Russell that he was going to
4 start taking some nude photographs, and it was time for Doug
5 to leave at that time, DuBois.

6 Q Did Mr. DuBois explain what other content of material was
7 in that box that Mr. Russell had sent to him?

8 A Yes, he said some of the hard drives contained hundreds of
9 pictures, his words, of the victims in various states of
10 undress, fully nude, some clothed, some provocative, as well
11 as a lot of other photos that were tagged or labeled that were
12 to be posted on the websites, on Mr. Russell's websites.

13 Q As part of this investigation, was it your experience that
14 it was evolving, that is didn't see much on the Internet and
15 as time went on started seeing more and more and more?

16 A That is correct.

17 Q And so did you have any pictures to show Mr. DuBois to say
18 "Did you see this from the box" or "Did you see this from the
19 box?"

20 A At that stage of the investigation, no, I did not.

21 Q Did Mr. DuBois get convicted himself?

22 A Yes, he did.

23 Q And is he serving a prison sentence for possession or
24 distribution or something?

25 A Yes, but I'm not sure if he's still serving that or what

1 the status of that is, but he was convicted in federal court
2 and was offered a plea.

3 Q Was that for his own material, for his own websites he was
4 running?

5 A Yes, in conjunction included -- part of that included
6 Mr. Russell's collection as well.

7 Q Later in June 2005, you and Agent Rothrock went to
8 Mr. Russell's house and did an interview; is that correct?

9 A That is correct.

10 Q Did Mr. Russell refer to this box or anything of interest
11 or significance being stolen from him?

12 A Yes, he did.

13 Q What did he say?

14 A I talked to him during the course of that interview, asked
15 about a box of materials, and Doug DuBois, to see what --
16 where he would lead me with that. And he right away claimed
17 that he did have a box, that did have hard drives, that did
18 have a lot of personal items in it. And he claimed that Doug
19 DuBois came and stole that particular box when DuBois and at
20 least one of his sons came down to help them move from, I
21 believe it would be the Braeburn Apartments over to the house
22 in Carmel, to the Carmel address; that during the course of
23 that move, he -- his claim, Dale Russell's claim, was that
24 DuBois took those articles from him.

25 MS. HELART: All right, thank you. No other

1 questions.

2 THE COURT: Did Mr. DuBois say anything about his
3 having put Mr. Russell's materials out on the Internet?

4 THE WITNESS: Yes, he did.

5 THE COURT: What did he say about that?

6 THE WITNESS: He stated that -- I asked him "What
7 did you do with them when you found them and found there were
8 pictures of the girls that you knew, what did you do?"

9 He said, "Well, I copied them of course."

10 And you know, "Why would you do that?"

11 He said, "Well, it's because they're -- I was there.
12 I know them."

13 And even Mr. Russell's stepdaughter, DuBois bragged
14 about how he had helped pay medical bills and bought clothes
15 for her and things. So for Mr. DuBois, it was kind of a sense
16 of pride and a trophy that he had copies of these pictures to
17 show his other webmaster friends that were also in some cases
18 possibly, you know, friends with Mr. Russell because they were
19 also running websites, that he shared with them as well.

20 THE COURT: Okay.

21 BY MS. HELART:

22 Q Did he, just as a clarification, did he say he sent them
23 to other people or he put them on his website?

24 A He said he sent them to other people. He did not post
25 them on his website. His words were "That could get me in

1 trouble because they could lead that back to me."

2 But he sent them to other webmasters, kind of like
3 other people who were running these child modeling websites
4 because they had a relationship between them on various
5 levels, but they would also share their personal collections
6 as well.

7 Q Did he ever relate what he had already seen on Dale
8 Russell's websites with what was in the box? Did he ever make
9 a comparison?

10 A To some extent. He explained that a lot of the pictures
11 that he saw on the hard drives were pictures that were on the
12 websites, because part of what Mr. DuBois said was they also,
13 as webmasters share and give each other master passwords so
14 they can actually access everything for free on each other's
15 websites, again just if nothing else, bragging
16 rights according to Mr. DuBois to say "Hey, look at my
17 collection, look what I have. Since you have several
18 websites, I'll give you a master password, you give me a
19 master password, and we'll look at each others sites for
20 free."

21 So he had access to Dale Russell's websites and made
22 comments that several of the photographs that were in the box
23 and on the hard drives were also images that were on the
24 website. And he did not -- to clarify that, too, he did not
25 make any specific statements on the pictures that were charged

1 here, that were on there. He didn't -- he didn't make any
2 allegations towards that.

3 Q Is the gymnastics video that Mr. DuBois had and saw in the
4 box the same one where at least it looks like the similar
5 photo shoot from Counts 2 and 4 of the girls in the gym?

6 A That's correct.

7 MS. HELART: All right. Thank you. No other
8 questions.

9 THE COURT: Cross?

10 **CROSS EXAMINATION**

11 BY MS. COOK:

12 Q Detective Byers, I just want to be clear about this. Now,
13 your testimony is that one of the items that was in the box,
14 at least according to Mr. DuBois, was the gymnastics video --

15 A Yes.

16 Q -- that's been at issue in this case?

17 A And that's the way he titled it at that time.

18 Q Now, are you familiar with a memorandum that was authored
19 by Agents Rothrock and Rodriguez concerning their interview of
20 Doug DuBois on May 31st of 2005?

21 A Briefly.

22 Q Okay. And during the course of that telephone interview,
23 Mr. DuBois was asked about how he obtained the videotape of
24 the victims doing nude gymnastics that was found in his
25 possession, right?

1 A Okay.

2 Q And he told the agents at that time he didn't know how the
3 tape got to his house?

4 A That's possible if you're reading from that. My interview
5 is a separate date, and it was after that date. I was not
6 present during their -- the interview that you're speaking of
7 there in their report, I was not present. I was not there for
8 that.

9 Q So on one occasion, he may have said he didn't know how he
10 got it, and on another occasion he may have said that
11 Mr. Russell gave it to him?

12 A May I clarify that with my answer?

13 Q Yes.

14 A On the telephone interview, he says he didn't know how to.
15 When I interviewed him in person during the course of a
16 proffer with his defense attorney present, he admitted that's
17 how he got the tapes. That's when he made the admission, when
18 he was -- during the course of a proffer.

19 Q He wasn't under oath either time, was he?

20 A No, he was not.

21 Q So you don't know which of those statements that he made
22 was truthful?

23 A No, I do not.

24 Q And he did tell you that it was he who copied the items
25 from the box and distributed them?

1 A That's correct.

2 Q Now, when you talked to him about this trip that he took
3 with Mr. Russell and his family to a beach in Florida, he
4 didn't identify that beach for you, did he?

5 A No, he did not.

6 Q So you weren't able to independently ascertain whether or
7 not that was a nude beach, were you?

8 A That's correct.

9 Q And at least with respect to the photographs that were
10 taken on that beach, he didn't get any copy of those
11 photographs from Mr. Russell?

12 A He stated he did not, that's correct.

13 Q And I believe you indicated that when the photographs were
14 taken in the gym at the point when the girls were not wearing
15 clothing, he was asked to leave?

16 A That's correct.

17 Q And he did?

18 A According to Mr. DuBois, yes, he did.

19 Q Now, you testified that there was a point in time when the
20 court had ordered Mr. Russell to take down the modeling
21 websites that we've been discussing?

22 A That's correct.

23 Q But prior to the time the court ordered those websites to
24 be taken down, those websites had been viewed by people who
25 found them to be objectionable?

1 A I believe -- to my understanding, not by law enforcement,
2 but I think that was something from the school and how that
3 was initiated. But not law enforcement, to my knowledge.

4 Q Nobody from the school ever told law enforcement that they
5 saw any nude photographs on those modeling websites, did they?

6 A No, that's correct.

7 Q And with respect to those modeling websites, Mr. DuBois
8 said, did he not, that he had seen disks of photographs that
9 came from the modeling websites?

10 A That's correct.

11 Q And that there was nothing inappropriate about those
12 photographs from the modeling websites?

13 A I don't think he made a comment to me one way or the other
14 that they were appropriate or inappropriate other than they
15 were photographs that were in various states of nudity.

16 I don't know that he made them, if that's what
17 you're asking. To make sure I'm clear, if you're asking if he
18 made a statement and he identified them as appropriate or
19 inappropriate? I don't remember if he did and I don't know
20 that he did.

21 Q You've never seen any photographs from those modeling
22 websites where the girls depicted were nude, have you?

23 A No, I have not.

24 Q And Mr. DuBois, when he indicated that he and Mr. Russell
25 had given one another access to the websites, also said that

1 at one point Mr. Russell had given him some computer disks
2 with photographs on them?

3 A Ask me the first part of that question again, would you
4 clarify?

5 Q Yes. You testified that they gave one another access to
6 the websites?

7 A That's true.

8 Q Mr. DuBois never produced any photographs from the
9 modeling websites for you that depicted nude girls, did he?

10 A No, he did not.

11 Q And he told you, or he told agents, that at one point in
12 time Mr. Russell had given him some computer disks with
13 photographs of them?

14 A That's correct.

15 Q And those would have been photographs of the girls in
16 question here?

17 A That's correct.

18 Q And he told you specifically that there were no
19 inappropriate photographs on those disks?

20 A I don't remember if he said that or not.

21 Q All right.

22 A I don't remember if I --

23 Q Have you had an opportunity to review the report of the
24 interview between Agents Rothrock and Rodriguez and
25 Mr. DuBois?

1 A It's been a couple of years since --

2 Q Would it refresh your memory to see a copy of that report?

3 A That would be helpful, yes.

4 MS. COOK: Might I approach, Your Honor?

5 THE COURT: Yes.

6 MS. COOK: I'm showing you what I'm representing to
7 you is a document provided to us by the Government containing
8 a summary of a May 31st, 2005 interview of Mr. DuBois, and
9 will direct your attention to the third paragraph from the
10 bottom on the second page and ask if you would review that.

11 MS. HELART: For the record, objection just inasmuch
12 as Detective Byers wasn't even there for this interview.

13 MS. COOK: He indicated that he had some familiarity
14 with it.

15 THE COURT: And he said it would refresh his
16 recollection.

17 MS. HELART: Okay, but just for the record, he still
18 wasn't present for this telephone interview.

19 THE COURT: That's how I understand it as well.

20 THE WITNESS: You said these last two paragraphs
21 here?

22 BY MS. COOK:

23 Q The third from the bottom, I think.

24 A Okay. It states here that DuBois states according to the
25 interview they had that none of those images were

1 inappropriate.

2 Q Okay. Mr. DuBois has never told you that Mr. Russell gave
3 him permission to open any box containing photographs or DVDs
4 or videos, did he?

5 A No, you're correct.

6 Q And then if he did open a box and retrieve those
7 photographs, he did that on his own because he was curious?

8 A That's correct.

9 Q He did it without permission from Mr. Russell?

10 A That's correct.

11 Q Then he copied that material and posted it on the
12 Internet?

13 A The first part of that is correct. He told me that yes,
14 he had got into it and made copies. The second part is he
15 e-mailed that to -- the copies of those to his other friends.
16 He didn't say that he actually posted it. So it kind of gets
17 into --

18 Q All right, I'm --

19 A -- are you posting it or sending it to someone on the
20 Internet? Yes, he transmitted across the Internet to other
21 people. But I don't know that he actually posted or hosted it
22 on a site.

23 Q Transmitted it via the Internet to other people?

24 A That is correct.

25 Q All right. Thank you, sir.

1 THE COURT: Redirect?

2 **REDIRECT EXAMINATION**

3 BY MS. HELART:

4 Q In response to Ms. Cook's question about did Mr. DuBois
5 ever produce nude photographs of Jane Doe 1 and Jane Doe 2,
6 you said no. Was he ever asked to produce nude photographs of
7 Jane Doe 1 and 2?

8 A I did not ask him that because all of his items -- he was
9 not in possession of any of his computers or computer-related
10 or digital media. That was all in possession of Immigration
11 Customs in Grand Rapids, and their forensics people were still
12 in the process of going through the examination. So I had no
13 cause to ask him to show me any pictures.

14 Q In other words, your "his" in that answer was Mr. DuBois
15 was no longer in custody of his own, Mr. DuBois's computer
16 equipment?

17 A That is correct.

18 Q And was he in possession of Mr. Russell's computer disks
19 that he had gotten in this box?

20 A To my knowledge, not at that time, no.

21 Q Because?

22 A According to the statement that Mr. DuBois made to me, he
23 had shipped that box back or given that box back to Dale
24 Russell. Dale had requested it back, so he gave it back to
25 him. And I'm not sure of the mode of transportation from

1 one -- from Michigan to Mr. Russell.

2 Q Are you trusting Mr. DuBois's definition of the word
3 "inappropriate"?

4 A No. Personally no, and professionally no.

5 Q And what about Mr. Russell's use of the word
6 "inappropriate" photos? Are you trusting that definition to
7 be the same as law enforcement's or the law's definition?

8 A No, I'm not.

9 Q All right. Thank you. No other questions.

10 THE COURT: Redirect?

11 MS. COOK: Very briefly, Your Honor.

12 **RECROSS-EXAMINATION**

13 BY MS. COOK:

14 Q I assume, Agent, that if Mr. DuBois said in the course of
15 his conversation with you that photographs were inappropriate,
16 you would have inquired as to what he meant by that, wouldn't
17 you?

18 A That's correct.

19 Q And asked if that meant nude photographs of minors?

20 A That's correct.

21 MS. COOK: No further questions.

22 THE COURT: Redirect -- Re-redirect?

23 MS. HELART: No, Your Honor.

24 THE COURT: You may step down.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Any further evidence?

2 MR. COOK: No further evidence, Your Honor.

3 THE COURT: I'll hear your argument, Mr. Cook.

4 MR. COOK: Thank you.

5 Quite frankly, the Government completely disagrees
6 with Miss Cook's assertion that there's a complete lack of
7 evidence of Mr. Russell himself distributing many of the
8 images that he produced of his daughters.

9 He told both girls that he would. He said, as we
10 heard in testimony from the trial from Jane Doe 1, that the
11 pictures at the gym that he took relating to Counts 2 and 4
12 were for special people who would pay more; not just himself,
13 special people who would pay more, inferring directly that
14 they would be distributed.

15 And in fact, they were found and continued to be
16 found to be out in the world. This Court just heard testimony
17 this afternoon that it's been found in 49 states and two
18 foreign countries.

19 This Court will recall testimony from Jane Doe
20 No. 2, the defendant's daughter, Jane Doe 2. This Court will
21 recall her recollection that she would not come off of during
22 cross-examination as she saw on her website nude photos that
23 the defendant had taken of her, that it was her understanding
24 that every photo that the defendant took of her was to go up
25 on a website.

1 Now, photos on a website can go up and down. We
2 don't know the extent to which the school system or whomever
3 it was that first became aware of this website, the extent to
4 which they got into it, but that is Jane Doe 2's memory, and I
5 would suggest to the Court that her testimony is credible,
6 especially taken together with her sister's testimony,
7 especially when taken together with the fact that these images
8 have been seen in 49 states and two foreign nations.

9 The Court is not asked today to make a finding that
10 Mr. Russell distributed these things through his modeling
11 websites, though it's quite possible that he did. The reason
12 that that point is brought up in the Government's response to
13 the defense objections is quite frankly that it's reasonable
14 to infer that if this defendant would post and sell images of
15 his daughters' in panties and other revealing clothes,
16 sexually-suggestive poses, it is quite reasonable to believe
17 that he, in fact, did sell images like the charged images, the
18 charges images themselves which are, in fact, again out in the
19 world.

20 It makes sense to believe that because he told them
21 that he would: "Special people who would pay more is why
22 we're taking these pictures today, girls."

23 Whether or not Mr. DuBois also sent these images
24 out, there is evidence that this defendant, Dale Russell,
25 distributed the images. There is evidence of that, and I

1 would suggest to the Court that in looking at the burden of
2 proof today, the preponderance of the evidence and the
3 credible evidence from this trial, and the surrounding facts
4 that have been presented today, that he should face the
5 two-point assessment on his guideline calculation. Thank you.

6 THE COURT: Thank you, Mr. Cook.

7 Do you want to present a rebuttal argument?

8 MS. COOK: Thank you, Judge.

9 We don't dispute the fact that the photographs that
10 were introduced into evidence at the trial were recovered and
11 have been recovered from numerous collections across the
12 country, but it's our position that there is absolutely no
13 evidence that Mr. Russell distributed those photographs.

14 The absence of nude photographs doesn't indicate the
15 presence of nude photographs. The Government hasn't
16 introduced one item of evidence that would indicate that
17 photographs that show up on an individual's computer were sent
18 to that computer from Mr. Russell. There's been no evidence
19 of that.

20 And although we certainly understand that one of the
21 girls testified as to having seen what she believed to have
22 been a nude photograph and what she believed to have been her
23 website, there's been no tender of any photographs that came
24 off those websites that depicted nude minors.

25 Yes, there were photographs on the websites that

1 depicted girls wearing a variety of kinds of clothing, but
2 none which were even arguably pornographic.

3 It is true that those websites were taken down at a
4 particular point in time, but the Government hasn't provided
5 the testimony of any individual who saw those websites before
6 they were taken down who would testify that they contain nude
7 images. And they haven't introduced any evidence that would
8 indicate that any of these thousands of people who apparently
9 have photographs in their collections have photographs of nude
10 minors that came off of those websites. There is a complete
11 paucity of evidence on that point.

12 If these photographs moved in interstate commerce,
13 it's our contention that they moved in interstate commerce and
14 they were distributed because Mr. DuBois, without
15 Mr. Russell's consent, looked at them and took it upon himself
16 to transmit them via the Internet. We think without any
17 credible evidence that the photographs were distributed by
18 Mr. Russell, that there is no basis for a two-level
19 enhancement for distribution.

20 THE COURT: Let me recount what I know and believe
21 that the evidence to have been with respect to this issue
22 based on the evidence adduced here and the evidence at trial.

23 What we know is that Mr. Russell took a lot of
24 pictures. He took a lot of pictures of Jane Doe 1 and Jane
25 Doe 2, many of which are actionable photos under the criminal

1 statutes for being sexually exploitative of a minor because
2 they were production of sexually-explicit visual or printed
3 material.

4 So there are those photos created along with the
5 others that may be less culpable, I assume they are less
6 culpable. They aren't charged in any event.

7 So we know there were a lot of photos taken.
8 Mr. Byers apparently said that in his proffer to the
9 Government attorneys in conjunction with the prosecution
10 against him, which makes those statements more believable
11 because of the point in time at which they were made.

12 We also have Mr. Russell's statement to Jane Doe 1
13 and Jane Doe 2 that explained his reasons for taking certain
14 photos, that they would bring more money, that they would be
15 more valuable, they'd be more lucrative, which sounds like an
16 intent to distribute for economic gain clearly.

17 We know that the photos, these photos, wound up in
18 Canada, so we know they were distributed. So the question is
19 whether Mr. Russell placed these specific photos into the
20 Internet channels so that they constituted distribution.

21 Now, the application note one definition of
22 distribution under Section 2G2.1 states as follows:
23 "Distribution means any act, any act, including possession
24 with intent to distribute production, transmission,
25 advertisement, and transportation related to the transfer of

1 material involving the sexual exploitation of a minor."

2 Because of the breadth of that definition, I believe
3 that the guideline has been complied with, that there was
4 distribution, even if you take Mr. Byers' testimony and only
5 Mr. Byers' testimony, that he received the box of materials
6 that included these photographs from Mr. Russell who
7 obviously -- at least obvious to me -- was trying to get rid
8 of them at that time when he was under the watchful eye of the
9 court and knew that the school officials had picked up on his
10 activities and his behaviors with the girls. He was trying to
11 get rid of these materials that he knew to be inculcating.

12 So you could say even that his possession himself
13 with the intent to distribute, his production of them, his
14 transmission of them to Mr. Byers, his transportation of them
15 to Mr. Byers, he let them go out of his control. They were
16 photographs he made, and he sent them to Mr. Byers knowing Mr.
17 Byers had an interest in this, a shared interest, and that
18 Mr. Byers was -- had been apparently with Mr. Russell and Jane
19 Doe 1 and Jane Doe 2 when other photos were made, that his own
20 interest in it and his own network of like-minded recipients
21 would be such that Mr. Russell was going to lose control of
22 these even if they were just copied and he got his originals
23 back.

24 So he gave them to an untrustworthy person in that
25 sense because he had reason to believe that Mr. Byers would

1 look at them. And guess what, he did. And guess what he did,
2 he made copies of them. So it was Mr. Russell who put in
3 process that chain of events first by taking the photographs
4 and then placing them in a place -- in a circumstance where
5 they were likely to be exploited by other people who shared
6 the same interests that Mr. Russell did.

7 Now, that's the facts in the light most favorable to
8 Mr. Russell, that he didn't actually distribute it.

9 Did I get the name of the guy -- oh, DuBois. Where
10 I said "Byers," I meant "DuBois." I'm obviously doing oral
11 findings here. So Mr. DuBois is the person to whom the box
12 was sent by Mr. Russell and he placed the box into
13 circumstances in which it was likely to be used, observed,
14 viewed, copied, and that's what happened.

15 When I said Mr. Byers before, obviously it was a
16 misstatement referring to Detective Andy Byers who testified.

17 So that's -- those are the facts most favorable to
18 Mr. Russell because they make the distribution one step
19 removed from him.

20 In my opinion, there's also evidence that would
21 justify a finding by the Court by a preponderance of the
22 evidence that Mr. Russell himself distributed them partly
23 because of the number of photographs, partly because of his
24 great interest in creating them and sending them out into the
25 Internet marketplace; and thirdly, because of his statement to

1 his daughters, Jane Doe 1 and Jane Doe 2, that more money
2 could be obtained by taking certain photos.

3 It could only be money from customers or people who
4 are accessing them, and that these photos were part of a much
5 larger pattern by Mr. Russell of photographing the victims in
6 various states of activity and undress.

7 So by a preponderance, I make these findings, and
8 will overrule the objection on removing the two-level
9 enhancement for -- because the offense involved distribution
10 as provided under 2G2.1B3.

11 Would you come back to the podium, please, Miss Cook
12 and Mr. Russell.

13 The next objection is No. 5, and it has to do with
14 your argument that the range of imprisonment under the
15 guidelines is not warranted by the empirical data. I'll take
16 that into account when I'm deciding a reasonable sentence, but
17 it doesn't represent an objection to the guidelines. So I
18 won't consider it in that context.

19 MS. COOK: And I think that Mr. McKinley will
20 address that argument as well.

21 THE COURT: That's fine.

22 The next objection's No. 6. The objection goes to
23 paragraph 71 with the five-level enhancement under Section
24 4B1.5B1. The presentence report reflects that five-level
25 enhancement because of the description of the defendant as a

1 repeat and dangerous sex offender against minors.

2 The defense objection was that it's not intended for
3 application here where the range -- it results in a range
4 which is far greater than necessary to satisfy the purposes of
5 the sentencing in this case. So in a sense, this is the same
6 argument in a different form; is that right?

7 MS. COOK: I think that the argument with respect to
8 the inapplicability of 4B1.5 is a little more specific than
9 the general argument about the sex offender guidelines.

10 THE COURT: Go ahead and make that because perhaps
11 the probation officer didn't catch it exactly right.

12 MS. COOK: It's our position that the application of
13 those guidelines to Mr. Russell's situation is unwarranted and
14 results in the imposition of a guideline range that is unduly
15 harsh and far greater than necessary to serve the purposes of
16 sentencing.

17 We would concede that the guideline is technically
18 appropriate with respect to an individual convicted of the
19 offenses for which Mr. Russell has been convicted. And I say
20 that because any person who produces at least two separate
21 images that are deemed to be pornographic photographs of
22 minors fits within the definition set forth in 4B1.5.

23 But I think that it would be inappropriate for the
24 Court to apply that guideline to Mr. Russell. The fact that
25 the Sentencing Commission included the section dealing with

1 repeat and dangerous sex offenders with the section that also
2 deals with career offenders and armed career offenders, it
3 gives us some idea of what they were thinking in terms of
4 creating this substantial enhancement for people who are
5 deemed to be repeat and dangerous sex offenders.

6 I mean, if we look at the analogous sections having
7 to do with career offenders, we find that the penalties are
8 substantially increased for those persons who are within their
9 categories, what we might call the worst offenders, those who
10 have multiple serious priors, armed felons, people who are not
11 amenable to treatment because they have already been in
12 institutions before as a result of prior convictions.

13 In this particular situation, this guideline is
14 applicable to people with no priors, no prior treatment, who
15 on a first offense have been convicted of simply creating two
16 separate photographs. The -- by including persons such as
17 Mr. Russell within the ambit of that enhancement, you have a
18 situation where there is no ability to distinguish people who
19 create two photographs from those individuals who are the most
20 culpable, those individuals who have, in addition to creating
21 at least two photographs, engaged in intercourse, photographed
22 minors who are engaging in intercourse, photographed minors
23 engaged in bondage scenes or bestiality scenes, all of those
24 offenders are lumped together in this enhancement.

25 And because they are all lumped together, you get

1 the inequitable result of someone who has taken the
2 photographs such as Mr. Russell's photographs, which are, I
3 think even the Government would have to admit, a far cry from
4 what the Courts have deemed to be the worst of the worst in
5 terms of the content of the photographs.

6 So the strict application of this guideline to
7 Mr. Russell is not only unwarranted but it's unduly harsh. It
8 results in a penalty which is unjust, and it punishes him in
9 the same way that it punishes individuals who can properly be
10 called the worst of the worst because they have had a history
11 of prior convictions for this offense, because they have
12 engaged in sexual intercourse with the victims of their
13 photography, because they have caused sex acts to be committed
14 between numerous victims of a far more tender age than the
15 girls in this case.

16 So it fails to distinguish between those type of
17 offenders who are the most culpable and people who find
18 themselves in Mr. Russell's situation. We think that that
19 strict application works an inequitable result, and believe
20 that the Court should not impose the five-level enhancement.

21 THE COURT: Thank you, Ms. Cook.

22 Mr. Cook?

23 MR. COOK: Your Honor, this seems an appropriate
24 time to offer to the Court, if it's ready to hear it,
25 additional evidence from Jane Doe 1, the defendant's daughter,

1 Jane Doe 1.

2 THE COURT: All right. Please have a seat over
3 here.

4 Good afternoon. Come to the witness stand. Remain
5 standing. Raise your right hand. Be sworn by the Clerk.

6 JANE DOE 1, PLAINTIFF'S WITNESS, SWORN

7 DIRECT EXAMINATION

8 THE COURT: You may be seated.

9 MR. COOK: May I proceed, Your Honor?

10 THE COURT: Please.

11 BY MR. COOK:

12 Q Would you please state your name for the record?

13 A Jane Doe 1.

14 Q And Jane Doe 1, you are the defendant, Dale Russell's,
15 daughter; is that correct?

16 A Yes.

17 Q Do you recall testifying during the trial in this matter
18 back in March regarding nude pictures he took of you; is that
19 correct?

20 A Yes.

21 Q You also testified very generally about inappropriate
22 sexual touching that your father did of you between 2001 and
23 2004; is that right?

24 A Yes.

25 Q I would like, if you're ready and able, to go over with

1 you this afternoon more about some of the details of this
2 incident. Are you prepared to testify about that?

3 A Yes.

4 Q If you could, why don't you tell the Court the first time
5 that you can recall any inappropriate contact between you and
6 your father.

7 A We lived at his friend Mary Kay's house, and we were -- he
8 had taken pictures of all three of us covered in powdered
9 sugar, and my brother and sister were in the shower and he sat
10 me on the toilet standing up and licked my genitals.

11 Q I want to back up just a little bit. First of all, you
12 said when he was living at Mary Kay's house. How old were you
13 at this time, to the best of your recollection?

14 A Around nine or ten.

15 THE COURT: Ten did you say?

16 THE WITNESS: Around nine or ten.

17 THE COURT: Nine I heard?

18 BY MR. COOK:

19 Q And when you say "the three of us," he took pictures of
20 you, who were the three people that were in the pictures?

21 A Me and my brother and my sister.

22 Q And what was the nature of these pictures? Were you
23 clothed or unclothed?

24 A Unclothed.

25 Q Where in the house did these pictures take place?

1 A In the kitchen.

2 MR. COOK: If I might approach the witness, Your
3 Honor, with Government's A and B?

4 THE COURT: Yes, you may.

5 BY MR. COOK:

6 Q And if you could take a look at those for a moment. Can
7 you tell the Court what Government Exhibit A is?

8 A Me and my brother and my sister in powdered sugar, covered
9 in it.

10 Q And how about Government's Exhibit B?

11 A Me and my sister covered in powdered sugar.

12 Q And those appear to be the images that were produced on
13 the evening that your father had inappropriate sexual contact
14 with you?

15 A Yes.

16 MR. COOK: Your Honor, I ask the Court to accept in
17 evidence Government's Exhibit A and B.

18 THE COURT: Have you shown them to the defense?

19 MR. COOK: I have.

20 THE COURT: Okay, yes, you may.

21 Any objection?

22 MS. COOK: No, Your Honor.

23 THE COURT: Exhibits A and B are admitted.

24 (Government's Exhibits A-B received in evidence.)

25 MR. COOK: May I proceed?

1 THE COURT: Yes.

2 BY MR. COOK:

3 Q Now, Jane Doe 1, you were fully nude in those photographs
4 your father took that evening?

5 A Yes.

6 Q Whose idea was it for you to be nude and take pictures
7 that evening?

8 A His idea.

9 Q Whose idea was it for you to be covered with what appears
10 to be some kind of powder?

11 A His idea.

12 Q What was that powder that we see in Government's Exhibits

13 A and B?

14 A Powdered sugar.

15 Q And who put that on your bodies?

16 A He did. Sometimes, like some of it, we did ourselves.

17 Q Now, you stated that the three of you, being your sister
18 and your brother --

19 THE COURT: I didn't understand your answer when you
20 said "Whose idea was it?"

21 A My father's idea.

22 THE COURT: Okay. I hear it now. Your father's
23 idea. Okay, go ahead.

24 BY MR. COOK:

25 Q Jane Doe 1, do your best to speak up if you can, although

1 I know it's difficult.

2 You stated that you, your brother and your sister
3 made your way to the bathroom. Was this to shower and get
4 this powdered sugar off of you?

5 A Yes.

6 Q Who got into the shower first, to your recollection?

7 A My brother and my sister.

8 Q And was your father in the bathroom with the three of you
9 as well?

10 A Yes.

11 Q You stated that you ended up -- were you standing on the
12 toilet? Did your father lift you up on the toilet?

13 A I can't remember. I think so.

14 Q Your testimony was that he licked your genitals; is that
15 correct?

16 A Yes.

17 Q Did he say anything about that to you at that time or any
18 other time?

19 A No.

20 Q Was there an additional incident around that same time
21 period when you were nine or ten years old of you being in a
22 shower?

23 A Yes.

24 Q Can you please tell the Court about that?

25 A He had come in the shower when I was in there and said

1 that -- he started washing me, and he said that "Wouldn't it
2 be nice to have your own personal -- your own person to wash
3 you for you?"

4 Q When you say he started washing you, did he wash your
5 genitals as well?

6 A Yeah, he washed my whole body.

7 Q And at that age when -- you were nine or ten years old at
8 that time; is that correct?

9 A Yeah.

10 Q At that age, were you in the common practice of bathing
11 yourself?

12 A Yeah.

13 Q So was it abnormal for your father to be involved in any
14 part of that process?

15 MS. COOK: I'm going to object to the leading nature
16 of the questions. I think he's had a lot of latitude with the
17 witness at this point.

18 THE COURT: Overruled.

19 BY MR. COOK:

20 Q I'm going to draw your attention or ask you, was there
21 then a third incident later in time that occurred between you
22 and your father?

23 A Yes.

24 Q Around how old were you when this third incident occurred?

25 A Around 10 or 11.

1 Q Where were you -- where was your father living at that
2 time?

3 A We lived at Braeburn Village Apartments.

4 Q If you would, tell the Court about this incident.

5 A He had used -- he had bought muscle relaxers for me, and
6 I -- and he used one on my genitals and held it on there.

7 Q Now what you refer to as muscle relaxers, can you describe
8 what those are for the Court, please, what your father called
9 muscle relaxers?

10 A They vibrated and they had batteries in them.

11 Q And were you nude when he held this against your genitals?

12 A Yes.

13 Q For how long did he hold this apparatus against your
14 genitals?

15 A For one or two minutes.

16 Q Now, Jane Doe 1, you had discussed with me on previous
17 occasions, and also earlier today, what these apparatuses look
18 like. I suppose I should ask you first, was there one "muscle
19 relaxer" or two?

20 A There were two.

21 Q And did both of those belong to you or --

22 A Yeah, I had both of them, that he gave to me and I gave
23 one to my sister.

24 MR. COOK: Your Honor, if I may approach the witness
25 with Government's Exhibit C?

1 THE COURT: Yes, you may.

2 MS. COOK: A preliminary question, Your Honor?

3 THE COURT: You may ask.

4 MS. COOK: Jane Doe 1, with respect to what's been
5 marked as Government's Exhibit C, is this a drawing that you
6 created today?

7 THE WITNESS: Yes.

8 MS. COOK: And you previously had created another
9 drawing?

10 THE WITNESS: Yes.

11 MS. COOK: Did the Government's attorneys ask you to
12 redraw it?

13 THE WITNESS: Yes.

14 MS. COOK: With more detail?

15 THE WITNESS: Yes.

16 MS. COOK: And did you have a discussion about the
17 detail?

18 THE WITNESS: No, I don't know -- what do you mean?

19 MS. COOK: What's been marked Government's Exhibit C
20 is a lot more detailed than what you drew previously.

21 THE WITNESS: Yeah.

22 MS. COOK: I have no objection.

23 THE COURT: Exhibit C -- are you offering Exhibit C?

24 MR. COOK: I suppose I should show it to the witness
25 and have her identify it first.

1 THE COURT: Yes, you should.

2 BY MR. COOK:

3 Q Jane Doe 1, I'd like you to take a look at Government's
4 Exhibit C, and is that a picture that you prepared today?

5 A Yes.

6 Q And you drew that yourself, correct?

7 A Yes.

8 Q Can you describe to the court what it is that you drew?

9 A Muscle relaxers.

10 Q Okay. And those accurately reflect your memory of them?

11 A Yes.

12 MR. COOK: Your Honor, I would ask the Court to
13 accept into evidence Government's Exhibit C.

14 THE COURT: No objection?

15 MS. COOK: No objection, Your Honor.

16 THE COURT: Exhibit C is admitted.

17 (Government's Exhibit C received in evidence.)

18 BY MR. COOK:

19 Q Jane Doe 1, at the time of these three incidents, what
20 were your feelings about them?

21 A I just -- what did you ask? Sorry?

22 Q At the time of these incidents, what were your feelings
23 about them? What was your reaction to the incidents?

24 A I just froze up at first, and I didn't tell anyone about
25 it for a long time, and I just -- you know, I thought it was

1 wrong.

2 Q Now, as we discussed during the course of the trial, you
3 had spoken with a number of people in law enforcement over the
4 years about whether your father had sexual contact with you,
5 correct?

6 A Yes.

7 Q And until February of this year, during the course of the
8 trial preparation, those prior incidences of speaking about
9 whether there had been sexual contact, you had always said
10 there had not been, correct?

11 A Yes.

12 Q Why did you say during those other times that he had not
13 had any sexual contact with you?

14 A Because I was still confused. I was still confused about
15 it, and not sure what had actually happened, and I guess I was
16 just -- at first, I was trying to protect him from getting
17 into any more trouble until I realized what he had actually
18 done.

19 Q Jane Doe 1, are you telling the truth today with
20 everything that you've testified about?

21 A Yes.

22 MR. COOK: Your Honor, I have no further questions.

23 THE COURT: Cross-examine?
24
25

CROSS EXAMINATION

BY MS. COOK:

Q Jane Doe 1, Mr. Cook asked you about -- did I just turn that off (indicating)? I'm sorry.

Mr. Cook asked you about your failure to tell other people with whom you had spoken about your father's activities, about these allegations you testified to today?

A Uh-huh, yes.

Q And as I understand it, you had conversations with people at your school about the modeling websites?

A Yes.

Q And you didn't indicate to any of those people, including a school counselor, that any of these activities had taken place?

A No.

Q And you were interviewed by local law enforcement officers?

A Yes.

Q You didn't tell any of them?

A No.

Q And during those interviews, the topic was whether or not your father had photographed you in inappropriate ways?

A Yes.

Q And those officers asked you, too, if your father had done anything else that was inappropriate?

1 A Yes.

2 Q And you denied it?

3 A Yes.

4 Q When your mother took your father back to court, you had
5 an opportunity to talk to a counselor?

6 A Yes.

7 Q And it was a female counselor --

8 A Yes.

9 Q -- who was concerned about your welfare?

10 A I guess.

11 Q And she told you you hadn't done anything wrong, right?

12 A Yes.

13 Q And during the course of your meetings with her, you
14 didn't tell her that there had ever been any inappropriate
15 touchings by your father, did you?

16 A No, we hadn't spoken very many times.

17 Q Well, during the times that you did speak with her, she
18 was concerned about your welfare, wasn't she?

19 A Yes.

20 Q And she talked to you about the photographs that had been
21 taken?

22 A No.

23 Q She talked to you about your relationship with your
24 father?

25 A No.

1 Q Well, what did she talk to you about during the counseling
2 sessions?

3 A We were just trying to get to know each other better. We
4 didn't get into any details about anything like that.

5 Q You had more than one session with her, didn't you?

6 A Yes.

7 Q In fact, you had more than two?

8 A Around three, I think.

9 Q Okay. And during those three counseling sessions, you
10 never told her that there had been any inappropriate touchings
11 by your father?

12 A No.

13 Q When this prosecution began, you had a number of occasions
14 when you met with the Government's attorneys?

15 A Yes.

16 Q And you didn't tell them, up until shortly, prior to the
17 trial?

18 A Yes.

19 Q And, in fact, you had a meeting with Mr. McKinley before
20 the trial?

21 A Yes.

22 Q Where he specifically asked you whether there had been any
23 inappropriate contact with your father?

24 A Yes.

25 Q And you told him that there hadn't been any?

1 A Right.

2 Q And it was only after you had some additional -- spent
3 some additional time with the Government's attorneys in
4 preparation for the trial that for the first time you made
5 these allegations?

6 A Yes.

7 MS. COOK: I have no further questions.

8 THE COURT: Redirect?

9 MR. COOK: No further questions, Your Honor.

10 THE COURT: Let me ask you a couple of questions if
11 I may. Who was the first person you told about the
12 inappropriate touchings and the experiences you've testified
13 to today? Who was the first person?

14 THE WITNESS: I told Brant.

15 THE COURT: You told Mr. Cook?

16 THE WITNESS: Yes.

17 THE COURT: And that was in the course of talking to
18 him getting ready for the trial?

19 THE WITNESS: Yes.

20 THE COURT: And when you told him about it the first
21 time, was this new information you brought up or did he ask
22 you?

23 THE WITNESS: When he had seen -- when he had seen
24 the way I answered to Mr. McKinley's question, he brought it
25 back up again.

1 THE COURT: And then you felt like you could tell
2 him the truth?

3 THE WITNESS: Yes.

4 THE COURT: Is what you've told us the truth?

5 THE WITNESS: Yes.

6 THE COURT: You know the difference between the
7 truth and a lie, don't you?

8 THE WITNESS: Yes.

9 THE COURT: And you know that because you told a lie
10 about this, or at least you didn't disclose it for quite a
11 while?

12 THE WITNESS: Yes.

13 THE COURT: And was that because it was hard to
14 tell?

15 THE WITNESS: Yes.

16 THE COURT: Because it made you feel bad about
17 yourself; is that right?

18 THE WITNESS: Yes.

19 THE COURT: Okay. Anybody else have any questions?

20 MS. COOK: No, Your Honor. Thank you.

21 THE COURT: Thank you very much. You may step down.
22 Your next witness.

23 MR. COOK: Your Honor, I have no further witnesses
24 on this point. I would ask the Court to hear argument if you
25 would.

1 THE COURT: I will.

2 MR. COOK: The Government did file a response that
3 was written. And I would point the Court back in that
4 direction, but I do want to make some response to some points
5 that were raised today by Ms. Cook.

6 Ms. Cook seems to suggest that the repeat and
7 dangerous sex offender portion of 4B1.5 is out of place
8 because it's in a section that is accompanied by a career
9 offender and those sorts of offenders. But that argument,
10 Your Honor, ignores the particularly pernicious nature or the
11 particularly damaging nature of the kind of conduct that the
12 defendant took part in, and quite frankly, Congress's strong
13 response to that, and Congress's strong suggestions to the
14 Court through the Sentencing Commission on how to deal with
15 these sorts of offenses.

16 The nature of this conduct is secret. Men like this
17 offender do their deeds behind closed doors, manipulating
18 children, in this case manipulating family members,
19 manipulating people into being quiet.

20 Often in this kind of offense, you don't catch a
21 person the first time or the second time or the third or
22 fourth or fifth time.

23 Because of that, the Sentencing Commission --
24 Congress, through the Sentencing Commission, has said that if
25 the Government can establish, as we have done here, that the

1 conduct took place on multiple occasions, that it should be
2 treated as severely as those who are career offenders and so
3 forth.

4 Secondly, I would point the Court to 18 United
5 States Code 3559(e) as just a very good simple example of how
6 serious Congress takes these offenses. Now, it doesn't apply
7 in this case, but that subsection, Your Honor, has where a
8 person has one prior conviction for the sexual abuse of a
9 child, and then, for instance, produces child pornography and
10 is convicted of such, they get a life sentence. It's not
11 three strikes and you're out in this kind of conduct. It's
12 two strikes.

13 The five-point enhancement for the kind of conduct
14 here, the manipulation of his daughters, two of his daughters,
15 of his ex-wife, the unrepentant manner in which this defendant
16 approaches the Court shows quite clearly that he is, in fact,
17 a repeat and dangerous sex offender, and that five-point
18 enhancement is entirely appropriate. Thank you.

19 THE COURT: Ms. Cook?

20 MS. COOK: Well, as Mr. Cook said, the two strikes
21 provision of 1859 doesn't apply here, and one might surmise
22 that that provision is in there to more harshly punish an
23 individual who has already been convicted of an offense and
24 had an opportunity to be rehabilitated and then reoffends.

25 Also, in the case of the guideline that we're

1 looking at, the enhancement is not for manipulation of other
2 people, much less manipulation of the mother. The enhancement
3 is simply based on two separate incidents of production.

4 So we think that that guideline throws an
5 extraordinarily broad net across offenders and captures
6 individuals such as Mr. Russell who cannot fairly be
7 characterized as being the worst of the worst of the sex
8 offenders who are prosecuted for like offenses.

9 We think that the Court should decline to apply it
10 in this case as the Court has the discretion to do given the
11 advisory nature of the guidelines.

12 THE COURT: The Court's judgment is as follows,
13 although this is a close call I have to say. And one of the
14 reasons it's a close call is because of the abhorrent nature,
15 as in abhor and nature, of the conduct that's been testified
16 to.

17 There's no getting past the fact that the behaviors
18 by Mr. Russell towards his children in the ways in which they
19 were testified to, not only here but at the trial, reflect
20 exceedingly grave exploitative behavior.

21 The defense virtually concedes that the behaviors
22 that have been testified to could fit within this provision,
23 but implores the Court not to expand on or exaggerate the
24 behaviors, bad as they are, by using the highly-punitive
25 five-level increase under the guidelines for repeat and

1 dangerous sex offenders against minors.

2 It does occur to me that that provision contemplates
3 something other than what we have here. As horrific as the
4 behaviors were, they don't reflect the repeat and dangerous
5 patterns of activity against minors that seem to be
6 contemplated under the guidelines.

7 So I will sustain the objection with respect to the
8 five-level increase but I will, at the same time, indicate to
9 the parties that I will fold this factor into the sentencing
10 decisions under the offense characteristics and behaviors
11 under the 3553(a) factors.

12 But in terms of the guidelines, we'll start the
13 guideline computation without regard to the five-level
14 enhancement as is set out in paragraph 71 I think it is. Let
15 me make sure. Yes, the Chapter 4 enhancements.

16 So I will disallow that five-level increase and
17 sustain the defense objection for the reasons that I've
18 stated. It does seem to me that this provision is intended to
19 address proven, extended patterns of activity that are
20 repeated in that sense and dangerous as to minors. And so for
21 the reasons stated, I'll disallow this enhancement.

22 Now, let's address the remaining objections in the
23 addendum. That is Objection No. 6, I think, that's
24 incorporated in that ruling. Objection 7 entitled Release
25 Status, the defendant has been detained, he says, since

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1 August 21, 2009. There's no response necessary to that
2 according to the probation officer.

3 Do you agree with that, Miss Cook?

4 MS. COOK: I think that the objection simply went to
5 the credit time that should be awarded to Mr. Russell.

6 THE COURT: Right, we let the Bureau of Prisons
7 decide.

8 MS. COOK: That's fine.

9 THE COURT: So I won't make a ruling on that.

10 (Brief interruption)

11 I don't know what's making that noise. The arrests,
12 both of those offenses you want to highlight were dismissed,
13 so no response is necessary to that.

14 Do you agree?

15 MS. COOK: Yes, Judge. The remaining points that I
16 made were primarily points of clarification of facts that were
17 set forth in the Presentence as opposed to objections calling
18 for a ruling.

19 THE COURT: Okay, good. Then I won't go through
20 each one because that's my analysis as well. I've noted them,
21 I'll have them in mind when I make the remaining rulings.

22 Now, noting your objections no doubt to the issues
23 where I did not sustain your objections, and preserving those
24 positions, do you nonetheless accept the presentence report as
25 it's been tendered and reviewed here in all other respects in

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1 other words?

2 MS. COOK: Yes, with the clarifications that we've
3 pointed out in our list of objections.

4 THE COURT: Yes, okay. So the presentence report --
5 (Brief interruption)

6 If someone has a cell phone on, that's likely
7 creating the feedback, so please turn off -- all the way off,
8 not just to silence, any cell phones.

9 I adopt as my own the Presentence Investigation
10 Report as it's been formulated here with the exceptions as
11 I've ruled upon them today, the most notable being paragraph
12 71 where I've disallowed the five-level enhancement.

13 The result of that is a total offense level of 44.
14 Is that how you do it, Mr. Schoettmer?

15 PROBATION OFFICER: Correct, Your Honor.

16 THE COURT: And a criminal history category of one,
17 and that results in the following guideline ranges: For the
18 period of incarceration, it's 2- -- let's see, 44, sorry.
19 It's life. It's still life.

20 PROBATION OFFICER: The guideline provisions doesn't
21 change.

22 THE COURT: Yes, that's what my quick review
23 demonstrates as well. So the period under the guidelines, the
24 period of incarceration is life. The defendant's not eligible
25 for probation. The period of supervised release is life. The

1 fine range is \$25,000 on the low end up to \$250,000 on the
2 high end. Restitution doesn't apply. The special assessment
3 of \$400 is mandatory and so that will be a part of the
4 judgment.

5 So with the exceptions noted previously, do you
6 agree with that extrapolation, Ms. Cook?

7 MS. COOK: We agree that that's the guideline, the
8 advisory guideline computation.

9 THE COURT: Right. Is that consistent with your
10 judgment as well, Mr. Cook?

11 MR. COOK: With the exception of the 4B1.5, yes, it
12 is, Your Honor.

13 THE COURT: So that's the beginning point for the
14 Court's decision making. I think it's appropriate if we take
15 a little break and we'll come back and hear from Mr. Russell
16 and his counsel, and then from Government counsel and impose
17 the sentence. So let's just take about a 10-minute recess.

18 (Recess taken from 4:11 p.m. to 4:31 p.m.)

19 (Open court.)

20 THE COURT: You may be seated.

21 The Court has been alerted, of course, to the fact
22 that there are victim impact implications here, and therefore,
23 victims who may want to address the Court. So do you wish to
24 present that information before I call on Mr. Russell and his
25 counsel or after?

1 MS. HELART: We would prefer to do it after
2 Mr. Russell's presentation and before the Government's
3 presentation.

4 THE COURT: All right.

5 Miss Cook, would you escort Mr. Russell to the
6 podium again, and Mr. McKinley as well.

7 Mr. Russell, as I indicated at the beginning of our
8 hearing, the Court's obligation is to impose a reasonable
9 sentence. We've gone through the guideline calculation so far
10 in our hearing in order to get that nailed down. And as I
11 said at the outset, having determined as best I can and as
12 accurately as I can a correct guideline application, then I
13 must decide one further thing, and that is, are the guidelines
14 reasonable here in your case.

15 The Court has to keep in mind the statutory
16 boundaries. The statute here says 15 years minimum up to 30
17 years maximum per count. And there are four counts. So I
18 must comply with that statutory range or those boundaries set
19 out in the statute.

20 But the Court has discretion with respect to issues
21 of supervised release and the fine amount, if any, and so
22 forth. So it's appropriate for you to speak and to tell me
23 whatever it is you want me to know and think about and take
24 into account.

25 I encourage you to use this opportunity because

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1 we're not likely to have another chance when you can influence
2 the Court's judgment on the important matters here. After I
3 hear from you, sir, then I'll hear from, I guess is it
4 Mr. McKinley?

5 MS. COOK: Yes, Your Honor.

6 THE COURT: Who will speak on your behalf. So you
7 may lead off, Mr. Russell.

8 THE DEFENDANT: Thank you, Your Honor. The picture
9 of the monster that the prosecution has painted is not me. I
10 am a good and loving father and have always tried to teach my
11 children right from wrong, good values, honesty and the
12 importance of education. Even though my beliefs and methods
13 may be unorthodox, there's a good heart behind them.

14 But like any parent, I've made mistakes, and it
15 breaks my heart to know my mistakes have caused such distress,
16 problems and embarrassment for my kids and my family. And I
17 am so sorry about that.

18 I alone am responsible for these mistakes, and I
19 would like to apologize to my family for any pain I've caused.
20 I wish I could turn back time and change what has happened,
21 but I can't. None of us can.

22 All I can do is ask God, my family, for forgiveness
23 and understanding. I had no intentions of ever creating
24 anything that could be misconstrued as pornographic nor for it
25 to leave the confines of our family, but it has happened, and

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1 I regret it every day.

2 So to my family and kids, I love you and I never
3 meant to hurt you.

4 (Pause.)

5 I'm truly sorry for what has happened. Please find
6 it in your heart and forgive me, and to you, Your Honor, in
7 your wisdom, please have mercy in your sentencing.

8 THE COURT: I know how difficult that was for you to
9 say those things, Mr. Russell, because the underlying fact is
10 that the ripples that go out from this case go way beyond
11 anything we can perceive or imagine. And nobody knows that
12 more or better than you do, because as a result of this
13 prosecution and the punishment that's going to ensue, it's
14 life changing for everyone.

15 Sometimes it's within the Court's power to say well,
16 you committed the crime, now you have to be punished and we'll
17 look forward to another day when you've paid your debt to
18 society and so forth. But the nature of these offenses is
19 such that the debt can't ever be discharged in that way, that
20 the punishment goes on, and the supervised release term goes
21 on, and the pain that you've caused your children, especially
22 your wife, your former wife, and the grandparents as they have
23 written about it, it's hard to imagine how it can end.

24 Maybe some things can happen that can ameliorate it.
25 Maybe there can be some psychological help, some good

1 counseling and psychiatric advice, but what we know is that
2 especially when the violations that occurred here, not just of
3 law, but the violations of the children's own sense of
4 personhood and integrity and so forth, when those violations
5 occur, the Court does not have enough power or wisdom to fix
6 all those problems.

7 The most that can happen here today, by virtue of a
8 sentence, is for the societal balance to be righted. We have
9 to put things back in as much balance as we can in terms of
10 society's interest. But as I said, the other interests can't
11 be fixed quite so easily, if ever, or if at all.

12 Because I presided over the trial and heard all the
13 testimony back and forth and had to make the judgments that
14 were entrusted to me on the law and what the statutes mean,
15 and how we had to position the case so the jury could decide
16 it and so forth, and now having heard the evidence today and
17 the arguments and so forth, if anything, having all that
18 information has just made my job harder because I see how many
19 interests there are to balance.

20 I think that what you've alluded to here, that
21 there's a certain disconnect between the facts that have been
22 portrayed, not just by the Government, but by the witnesses
23 that were called by the Government, there's a disconnect
24 between what you perceived to be your true self and your true
25 intentions, and that picture or that description.

1 I can see how you can say that because I think there
2 are some elements in your background and in your outlook that
3 are worthy goals, but somehow it all got ugly and it got
4 distorted and it got pushed beyond the pail, and that's when
5 it became illegal.

6 And now, the underlying fact is that these pictures
7 that you took, for whatever purpose you say you took them, are
8 out there for all the world to see. So that's the harm.
9 That's what Congress says when it enacts these statutes and
10 imposes severe penalties. And that's why we're here, because
11 of that.

12 Mr. McKinley, what would you say on Mr. Russell's
13 behalf?

14 MR. MCKINLEY: Your Honor, this Court obviously has
15 an unenviable task today in trying to determine what is enough
16 time, what is sufficient but not greater than necessary to
17 comply with the purposes of sentencing in light of the nature
18 and circumstances of the offense and the history and
19 characteristics of Dale Russell.

20 With regard to the offense conduct, I'm not going to
21 stand here and try to soft pedal it. I can't begin to imagine
22 what the victims have endured in this case. I recognize that
23 this is -- this case presents difficult issues from a variety
24 of perspectives.

25 The fact that the conduct here isn't as egregious as

1 it is in many pornography cases that we see in federal
2 district court, the fact that there were no physical injuries
3 to the victims do little to ameliorate the real impact of the
4 offenses that Mr. Russell's been convicted of here. And I'm
5 not -- like I say, I'm not going to try to stand here and soft
6 pedal what happened.

7 The only dispute as to what transpired here involves
8 allegations by the victims of improper sexual touching, which
9 Dale Russell has adamantly denied that there was any -- there
10 was ever any inappropriate touching. But be that as it may,
11 the fact that these images have been disseminated around the
12 world, we're certainly sensitive to the impact it's going to
13 have on him.

14 I mean, I read the impact statements. We've all
15 read the impact statements. And quite frankly, they just tear
16 your heart out. I know that. But one of the things that
17 you're required to consider also is Dale Russell's personal
18 history and characteristics. And he is certainly not a man
19 without unredeeming qualities.

20 I don't know if I said that right -- he is a man
21 with many redeeming qualities. He's got no criminal history
22 to speak of, and I won't go through all of this because I
23 think it's -- there's a very fair snapshot of his personal
24 profile and personal background contained in the presentence
25 report.

1 But when we think about what is sufficient and what
2 is sufficient to promote respect for the law, to provide for
3 adequate deterrence, to provide for just punishment, we have
4 to keep this case and this conduct in perspective.

5 The Government has suggested that in light of the
6 statutory maximum here, which if you stack sentences, the
7 maximum sentence, really we're looking at a range of 15 years
8 on the bottom end to 120 years.

9 The Government's not asking for 120 years. The
10 Government's asking for 80 years. And in support of that,
11 they have cited other cases which they say maybe give this
12 Court some guidance as to what an appropriate sentence would
13 be in light of how other people, similarly-situated defendants
14 have been sentenced. But the Government's examples are way,
15 way wide of the mark.

16 They reference the case of United States versus
17 McGrath. Mr. McGrath was sentenced, I think, about two weeks
18 ago. He received a sentence of 370 years. They reference
19 United States versus Dick Noel. Dick Noel received an 80-year
20 sentence after proceeding to trial.

21 They reference United States versus Mark Armstrong,
22 a New Albany case that I believe was Judge Hamilton, where
23 Mr. Armstrong received a 75-year sentence.

24 The facts of those cases -- and I don't claim to
25 have any intimate familiarity with those, my familiarity of

1 those is largely from the public record; but I know that all
2 of those cases involved images that portrayed not just
3 sexually-explicit conduct, but actual sexual acts,
4 intercourse, oral and anal penetration, most portraying the
5 defendant himself engaged in such conduct with not just
6 minors, but infants, ranging anywhere from two to 12 years
7 old.

8 Even if the Court credits the testimony of Jane Doe
9 1 concerning the allegations of improper touching, we're not
10 anywhere near comparable to the cases of Dick Noel,
11 Mr. Armstrong or Mr. McGrath.

12 The Government suggests in its sentencing memorandum
13 that they -- that these ought to serve as some kind of sign
14 post, or some type of indicators of, or a touch stone for how
15 a sentence ought to be fashioned here. Every one of those
16 defendants received a life sentence. 80 years is a life
17 sentence. 75 years for a person who's in their 50s is a life
18 sentence.

19 An 80-year sentence, which is what the Government's
20 requesting here, after good-time credit, would require Dale
21 Russell to serve a minimum of 69 years, eight months and eight
22 days. His projected release date would be February of 2079.
23 He will be 117 years old. A 60-year sentence is a death
24 sentence for Dale Russell.

25 Life sentences are for a Bernie Madoff. They are

1 for Desmond Turner. Life sentences are for Richard Reid, the
2 shoe bomber. Life sentences are for people like Dick Noel,
3 people like Mark Armstrong and people like McGrath. This is
4 not a case that calls for a sentence of life in prison. And
5 that's what the Government is asking for here.

6 A sentence anywhere in the range of what the
7 Government is suggested here, it's like a live burial. I
8 mean, it's going to extinguish any hope that Dale Russell
9 would have for the rest of his life for ever getting out of
10 prison. That type of sentence, I submit, has to be reserved
11 specifically for the worst of the worst. And notwithstanding
12 all of the allegations and all of the evidence that's been
13 introduced in this case, Dale Russell is a far cry from being
14 the worst of the worst.

15 I submit that the sentence here has to be tempered
16 with the realization that this man deserves an opportunity to
17 demonstrate that this is never going to happen again. A
18 lifetime of supervision, which I know is going to follow any
19 term of imprisonment that's imposed here, guarantees that he's
20 going to conform his conduct to the prescriptions of law
21 because one slip up, one failure to report, can trigger what,
22 a life sentence. Again, this man is not the worst of the
23 worst.

24 Deterrence? The Government suggests we need to have
25 that, we need to have an 80-year sentence to send that message

1 out to the larger population. The only message a life
2 sentence like that sends is that the sentence is based on
3 vindictiveness and retribution, because it's life. He is not
4 the worst of the worst.

5 Deterrence? Yes, a substantial sentence is required
6 in this case, but 15 years, 16, 17, 18 years is a very
7 substantial sentence. It's a sentence that if that is not
8 going to deter someone when that sentence is followed by a
9 lifetime of supervised release, I venture to say little --
10 there's nothing that's going to deter someone from engaging in
11 this conduct who's determined to do so.

12 The need to avoid unwarranted disparity now;
13 tempering the sentence with an understanding and appreciation
14 that this is not the worst of the worst is not going to
15 generate any type of disparity. That would be completely --
16 what would create a disparity is to sentence him to
17 effectively a life term.

18 Prior to the hearing today, we looked at some 7th
19 Circuit cases because I recall that there had been some
20 language, particularly from Judge Posner in a concurring
21 opinion back in the '80s. And we found this language. And he
22 noted, "There's a worthy tradition that death in prison is not
23 to be ordered lightly, and the probability that a convict will
24 not live out his sentence should certainly give pause to a
25 sentencing court."

1 A sentence that forces or results automatically in a
2 person going to prison knowing they are going to die in
3 prison, that's where they are going to spend their entire
4 life, inflicts considerable more punishment than other types
5 of sentences. To extinguish all hope is not something that's
6 warranted here. It's not something that's justified here.

7 I am not going to make a specific sentence
8 recommendation for this Court other than I'd ask this Court to
9 be mindful that we're dealing with a 48-year-old man here who
10 is facing a mandatory minimum that is going to render him --
11 he's going to be in his middle 60s even with a minimal
12 sentence here.

13 What is sufficient, but not greater than necessary,
14 I think that's sufficient. The Government's recommended
15 sentence here is significantly more than what is necessary to
16 accomplish all of those appropriate goals that are set out in
17 3553(a).

18 I'd ask this Court to take those things into
19 consideration and give Mr. Russell some hope that he will be
20 able to breathe the fresh air of a free man at some point down
21 the road.

22 It's an appropriate sentence in this case, and I
23 think that it would reflect that he is a far cry from being
24 the worst of the worst.

25 THE COURT: Thank you, Mr. McKinley.

1 Ms. Cook, do you wish to defer to Mr. McKinley's
2 argument?

3 MS. COOK: Yes, Your Honor, thank you.

4 THE COURT: Would you move over, the three of you, a
5 little bit, and give Mr. Cook some podium space.

6 Or is it you, Ms. Helart, which one?

7 MS. HELART: I will be taking care of the victim
8 impact statements, and Mr. Cook will be making the argument.

9 THE COURT: You might as well be seated because it
10 will take a little longer.

11 MS. HELART: If the Court has Mr. and Mrs. Mills'
12 victim impact statements --

13 THE COURT: I've reviewed all the statements that
14 have been submitted.

15 MS. HELART: The victim impact statements that would
16 like to be read are Mrs. Russell and Jane Doe 1 and Jane Doe
17 2's victim statements.

18 THE COURT: It was Jane Doe 1 who testified, right?

19 MS. HELART: Yes.

20 THE COURT: Is she 1 or 2?

21 MS. HELART: She's 1.

22 This is from Mrs. Dawn Russell:

23 "I would like to make known the degree of
24 destruction Dale Russell has caused in my life. The crimes he
25 committed against my children, his own daughters, are the most

1 heinous offenses an adult can commit against a child, and this
2 is a father to his own children.

3 "I found out about the websites from the Greenfield
4 Police Department, and was told there would be further
5 investigating, which was reassuring, but the impact of the
6 trauma was profound. I felt an overwhelming need to protect
7 my kids and found it difficult to do anything else. I felt
8 like I couldn't move, and as a result, lost my job.

9 "With no income to pay rent, nor child support, we
10 were evicted. A friend graciously allowed us to live in one
11 of his rental properties rent-free. I planned to stay only a
12 month or two, but it ended up being seven. Still traumatized
13 and with no income, nor child support, my teenage kids and I
14 moved into the Hancock County Homeless Shelter where we all
15 slept in an 8-by-10 room. After staying there a month, we
16 moved into the shelter's transitional housing, but after ten
17 months there, we and every tenant in the apartment building
18 was evicted to do repairs and given one month to move out.

19 "It wasn't much time, but I found an apartment in
20 the same middle school district so Jane Doe 2 didn't have to
21 change schools again. I had found a job but wasn't able to
22 keep it and rent was still due. We would have been homeless
23 again if my parents would not have helped out.

24 "It was 18 months before I started feeling stronger
25 and not paralyzed, but I will always be scarred by Dale's

1 actions. My daughters are beautiful, and when we are out, it
2 concerns me when a man looks at them longer than a glance
3 fearing that he recognizes them from the exploited photos Dale
4 took and distributed.

5 "I'm concerned for their physical safety if they are
6 recognized. I am concerned about the repercussions these
7 crimes could have on my kids as they go through life stages,
8 and I'm concerned for the level of self-respect each one
9 carries, and that it may not be high enough, thus causing them
10 to make poor choices as they go through their lives.

11 "Now, when I meet a man I might consider dating, I
12 wonder if he could have inappropriate attraction to my
13 daughters. I don't date much. Dale is an expert liar, thief,
14 computer hacker and pedophile. And I ask for the longest
15 sentence allowed for his crimes and that he never have access
16 to a computer while he serves it.

17 "Signed, Dawn Russell, 5-17-2010."

18 This is from Jane Doe 2:

19 "The terrible things my father did has greatly
20 affected the lives of my family, and little" --

21 Excuse me.

22 (Pause.)

23 I think part of this is a copy issue.

24 -- "the lives of my family, and he made me and my
25 sister believe that everything he did was --

1 THE COURT: She says "It affected the lives of my
2 family and I. He made me and my sister" as I read it.

3 MS. HELART: Yes. I'll start over.

4 "The terrible things my father did has greatly
5 affected the lives of my family and I. He made me and my
6 sister believe that everything he did was normal. He made us
7 lie to my mom countless times and had no remorse.

8 "He left my mom with three kids and no support. He
9 made her have to go through things that no mother should have
10 to. He made my childhood a horrible secret that no one could
11 know. He exposed us for his own sick pleasure.

12 "How could a father do these things to his own
13 innocent daughters and then plead not guilty? Why would he
14 even want to? He is a horrible person for doing what he did,
15 and he does not deserve to be any part of my life or memories.

16 "I will never forgive him. I hope he spends the
17 rest of his life in prison.

18 "Signed, Jane Doe 2."

19 The third statement is from Jane Doe 1:

20 "I wish I could close my eyes and it would all go
21 away, but all I see are flashbacks. I used to think I had a
22 good, normal dad who took his kids places, loved them and
23 taught them things, but mine was living two different lives.

24 "I've had to live with the question my whole life of
25 which side is really him, but the hardest question to answer

1 is why? He got us to trust him with only a trust that
2 children have with their fathers, then manipulated us into
3 believing his lies, and then twisting my view of right into
4 something I thought was strange and wasn't allowed to tell
5 anyone about.

6 "Then there was a lot of confusion. My dad had me
7 eating out of the palm of his hand to the point where I was on
8 his side, and I was drifting away from my mom because I didn't
9 understand what was going on.

10 "Even after it all came out about the pictures and
11 the websites, I was so brain-washed that I didn't talk to my
12 mom about it at all, and I kept things from her and the
13 lawyers just to make sure that he didn't get in trouble.

14 "There was so much anger, confusion and sadness
15 built up in me, and still is. After being depressed, I
16 started to realize the raw truth in this situation, that I
17 couldn't hide from it, and it wasn't going to disappear. I've
18 had to live my life pretending to be happy, like nothing is
19 wrong. I had it all inside.

20 "My privacy and myself has been violated and my
21 pictures are on the Internet all over the world. It's an
22 undescribable, horrible feeling. I don't understand why
23 people ruin lives like this just for their own personal
24 pleasure.

25 "The pictures they see of the children are actually

1 real people. They grow up to live their lives just like
2 everyone else. I am one of them. And I didn't ask for this.

3 My dad will never know what it feels like. How is
4 that fair? This has impacted my future because I try not to
5 live in the past. All I can do now is look forward. I can't
6 let it consume my life, and I try not to let it hold me back.
7 My boyfriend taught me that.

8 "It's not easy to explain to my boyfriend and
9 friends the things that have happened, and I know it has
10 affected their lives, too. I sometimes get so mad about the
11 smallest things because I have anger bottled up inside of me,
12 and I let a lot of it out on my boyfriend, which doesn't help
13 our relationship either.

14 "My mom was left with no support trying to raise
15 three kids on her own. Our relationship isn't the same, and I
16 hate seeing her so upset about this. She was just trying to
17 protect us and she couldn't even do that.

18 "I've missed school for days when I feel like
19 staying under the covers and not talking to anyone. It's not
20 easy having to go downtown all the time in the past six years
21 to answer questions about things that I really don't want to
22 talk about, and going through another court.

23 "Because of someone else's decisions and actions, I
24 had to suffer, my sister had to suffer, and my family had to
25 suffer, all because of one person.

1 "People say one person can change your life, usually
2 for the better, and that's true. But why should one person
3 have that kind of power, to change someone's whole life, not
4 for the better but for the worst.

5 "Even though I've tried so hard to forget, there's
6 not a day that goes by that it doesn't affect me. If it's
7 that I break down into tears all of a sudden, I don't talk for
8 a day, I get random flashbacks, I have horrible nightmares, or
9 I have to tell someone that my dad isn't around, but I do try
10 to forget.

11 "He's out of my life and that's his decision. I
12 don't want to see him again. I hope he stays in prison
13 forever. Even if he does, that's not going to take back
14 anything that happened.

15 "Signed, Jane Doe 1."

16 THE COURT: Mr. Cook?

17 MR. COOK: Thank you, your Honor. If I can have
18 just a moment.

19 (Pause.)

20 May it please the Court, counsel: The Court has
21 been presented with a large amount of information about this
22 exceptionally serious case already. The Court's seen a
23 two-and-a-half-day trial. You've read through a long
24 presentence report, heard aspects of this hearing today.

25 The Court read and now has heard read through its

1 victim impact statements from the victims of these offenses.

2 The Court has seen sentencing memoranda from both sides.

3 In one sense, there's not much left to say, but yet
4 there are certain points that need, in my opinion, Your Honor,
5 to be highlighted for the Court, and in the context of what
6 the sentence must ultimately be, and that the sentencing
7 factors that 18 U.S.C. 3553 are appropriately considered; and
8 that is, the Government would suggest a sentence of not less
9 than 80 years.

10 Now, I want to address this looking at two general
11 points: Number one, why the sentence of this defendant must
12 be so lengthy as to ensure that he never gains his freedom
13 again; secondly, why a sentence that is in excess of his life
14 span, not less than 80 years, is not just appropriate but is
15 demanded by the nature and circumstances of these vile
16 offenses by an appropriate consideration of the guidelines and
17 the sentencing factors of 3553(a).

18 Looking first to why a sentence that ensures
19 Mr. Russell never gets out, Your Honor, I would argue it's not
20 a close point that he must never regain his freedom. In
21 looking simply at just a few of the sentencing factors at
22 3553(a), protection of the public from further crimes of this
23 defendant and his history and characteristics demonstrates
24 this quite well.

25 Quite simply, Dale Russell is a remarkably dangerous

1 individual. He is a talented exploiter of children. To look
2 at him sitting here today or meeting him on the street, this
3 is a hard point to grasp, but that's exactly the point.

4 This offender was able to hide in plain sight over
5 the course of the year that the offenses that are before this
6 Court took place, over the course of the years that he
7 manipulated his daughters and to allow him to take naked photo
8 photographs of them, the years that he psychologically and
9 emotionally manipulated them into fueling his and others to
10 whom he distributed these pictures sexual desires.

11 He manipulated his girls when they were 10 and 12
12 years old, and even younger, to pose in sexually-suggestive
13 outfits, bathing suits, underwear, and finally fully nude.
14 And had so twisted their trust and love of him to his own
15 purposes that they actually enjoyed doing these photo shoots
16 and agreed to hide from their mother that there were websites
17 of them with these sexually-suggestive pictures being sent God
18 knows where; that pictures of them taken in the nude at
19 Spectrum Gym were being given to special people who would pay
20 more.

21 To victimize one's own children to this degree takes
22 a special and horrific talent that this defendant demonstrates
23 quite well.

24 The defendant similarly demonstrated his great
25 talent as a sexual exploiter of children, and has managed to

1 keep the children quiet over this long period of time. They
2 wanted to please their father and he used that love to his
3 advantage to repeatedly sexually exploit them for his
4 enjoyment.

5 This is not an easy task to pull off, yet this
6 defendant was successful in so doing for years. This
7 defendant's history and characteristics also demonstrate that
8 he cannot be expected to comply with conditions of supervised
9 release if he's ever allowed to rejoin society.

10 First, he's completely unrepentant. To this day, he
11 maintains that his despicable pattern of exploitation was in
12 fact some form of art.

13 This defendant, in almost a cliché form, tried to
14 escape prosecution by fleeing to Mexico after the United
15 States Attorney's Office made clear it was moving forward
16 against him. He did not return to the States till he was
17 forcibly expelled from that country and escorted out and met
18 here.

19 This defendant is also \$37,000 in child support
20 arrearage to these very children whom he claims to love so
21 much. He refused to support them, refused to abide by a court
22 order.

23 In short, this defendant's history and
24 characteristics show a long pattern of him trying to dodge
25 legal liability and court orders over and over again.

1 In conclusion on this point, Your Honor, this
2 offender is remarkably dangerous. The United States Congress,
3 through the Sentencing Commission, recognizes it, which is why
4 it's a guideline life sentence. 3553(a) recognizes it when it
5 directs the Court to look at adequately deterring him and his
6 history and his characteristics.

7 This is not a close question. He must be in prison
8 till the day he dies.

9 The question before the Court then also, and the
10 Government's asking for a term of 80 years, that is well in
11 excess of this man's remaining life span, is how does that fit
12 into the 3553(a) factors? How is that a just sentence?

13 Well, first, I want to look at the guidelines just
14 quickly. They calculate a total offense level of now 44, with
15 the 4B1.5, five points not being given.

16 Even at that very high offense level, the
17 defendant's conduct is actually underrepresented. It doesn't
18 take into account necessarily what he did to his daughter,
19 Jane Doe 1, on at least three occasions where he had sexual
20 contact with her, where he licked her genitals.

21 It underrepresents what he did because only two
22 points are added to the offense level for distribution of
23 images.

24 Now, we had a long argument today in front of the
25 Court about whether those two points would even be assessed.

1 I would suggest to the Court that clearly they ought to have
2 been, and the Court made the right decision, but that two
3 points doesn't capture that added -- that added harm that is
4 done with that distribution.

5 You heard in some of the victim impact statements
6 about how each of the defendant's daughters have been
7 victimized. You heard how they're struggling to learn to deal
8 with that. You heard how these images have been found in 49
9 states and two other countries.

10 A two-level enhancement on the guidelines does not
11 begin to capture -- does not represent the totality of just
12 the evil of that distribution out into the world.

13 In any event, even where the offense level is, the
14 guideline sentence is maximum consecutive sentences on each
15 count of conviction. As noted in the sentencing memorandum,
16 the 7th Circuit has repeatedly upheld sentences well in excess
17 of the remainder of the defendant's life.

18 And in cases similar to the defendant's, I would
19 cite the Court to United States versus Dick Noel as we did in
20 our sentencing memorandum. I'll talk about that case in
21 response to the defendant's argument here in a moment, but the
22 defendant's guideline sentence is 120 years, and that just is
23 what it is, but it is equally clear that the defendant must
24 get a sentence well in excess of his natural remaining life.

25 In looking --

1 COURT REPORTER: Would you please slow down?

2 MR. COOK: Yes.

3 It is equally clear that the defendant should get a
4 sentence in excess of his remaining life.

5 Looking simply at 3553(a): The nature and
6 circumstances of these offenses are just terrible and
7 demonstrate exactly why Congress and the courts take these
8 cases so seriously.

9 Now, I know that the Court is well aware of what
10 this defendant has done at this point, but I raise the
11 following points that cannot be overlooked as you pass
12 sentence today, as this Court struggles to sort out what is a
13 just sentence in this case.

14 These were the defendant's daughters when they were
15 10 and 12 years of age, as they're starting to come into their
16 own, starting to form their own individuality; at an age, at
17 least at 12, where perhaps a girl is just starting to get some
18 awareness of her sexuality; and the defendant, at that point
19 in their lives, his own daughters inserts his twisted view of
20 what sexuality is, his twisted view of when it's appropriate
21 to take your clothes off, what kind of poses to take.

22 These girls, now 15 and 17, now have to learn to
23 live with not just that they were sexually objectified by
24 their own father, but that nude images of them are all over
25 the country and world.

1 This is exactly why the base offense level is so
2 high on the guidelines, and the mandatory minimum and
3 statutory maximums are so high on this case.

4 Congress sees the need to stop these sorts of
5 offenses, both to stop the hands-on exploitation that this
6 defendant did do on at least three occasions with his
7 daughter, Jane Doe 1; but also to stop the horrific,
8 never-ending exploitation of images being passed around the
9 world that was made possible by this defendant, this man,
10 creating digital images that can be distributed with a touch
11 of a button.

12 The Court's also directed in 3553(a) to consider how
13 to craft a sentence that provides a just punishment. The
14 Government suggests to the Court that a single life sentence
15 is simply not adequate. It is not just for what this man did,
16 to run any count concurrent to another is to ignore his
17 heartless, cruel manipulation of children. It is not just to
18 let him get away with even one of these travesties, even one
19 of these four counts of convictions that is before the Court.

20 The Court is also directed in 3553(a) to craft a
21 sentence that affords adequate deterrence to criminal conduct
22 or simply general deterrence. Your Honor, simply put, those
23 people who are like this defendant, who would contemplate, or
24 who are currently doing something like what he is doing, we
25 heard about these other individuals with whom he would

1 correspond, the Doug DuBoises of the world, and the other
2 individuals who are trying to do these modeling websites and
3 so forth. They can only be shaken from that sick obsession
4 when they see a court that is willing to issue a sentence that
5 will address the full monstrosity of their crimes if they step
6 over the line, as this defendant did on multiple occasions.

7 Defenders like this defendant will not stop if they
8 do not live in fear of being subjected to the full power of
9 the law.

10 I might point out as well that, where as here the
11 images that this defender created are now so widespread, are
12 the subject of prosecutions around the country, that it's
13 important that there be an appropriate sentence that labels
14 the depravity, the seriousness of the criminal conduct that
15 this defendant engaged in. There needs to be that. There's
16 the general deterrent effect that this sentence can be larger
17 because of the extent of his distribution.

18 In a sick sense, this offender, by being the
19 producer of these images that are so widespread, is famous,
20 and we need a sentence that speaks to other offenders like him
21 and to those who would traffic in and possess the images of
22 his daughters.

23 Finally, Your Honor, the sentence comprised of
24 consecutive sentences on each count of conviction is in line
25 with where similar offenders in this district have been

1 appropriately sentenced.

2 Now, the Government recognizes that it's always
3 dangerous to compare cases. I get that. The cases cited to
4 this Court in our sentencing memorandum are cited for the
5 principle that consecutive sentences with guideline life, even
6 where you're criminal history one, are appropriate in these
7 sorts of circumstances.

8 I would like to also note that, again being careful
9 not to argue about different facts and different cases, but
10 looking at United States of America versus Noel, that was
11 appealed and affirmed in the 7th Circuit, the images in that
12 case that involved a single victim, were images of lascivious
13 exhibition of his genitals or pubic area with the exception of
14 one image of the genitals of the offender in close proximity
15 to the child depicted, while the child was asleep with no
16 evidence that -- that that conduct took the next step to
17 actual contact.

18 So it's entirely appropriate to look at the United
19 States versus, to look at these other cases such as United
20 States of America versus Mark Armstrong, United States of
21 America versus Andrew McGrath, and say what did courts do
22 there? What do they do there? Well, the general principle is
23 that consecutive sentences were appropriate.

24 Here's what the Government's asking for, Your Honor.
25 The Government is seeking not less than 20 years on each count

1 of conviction running consecutive to one another. That is
2 based on the principle that I mentioned a couple times during
3 my presentation, that this defendant should not get a free go
4 for the exploitation and manipulation of his daughters.

5 Now, two of those -- two of the counts happened on
6 the same evening in the Spectrum Gym, but they were one each
7 to each of his daughters. He shouldn't get a free go at
8 another one of his daughters.

9 The 20 years takes into account the fact that these
10 images were "only lascivious exhibition" but they should still
11 be run consecutive to allow for his manipulation for the
12 separate times that they occurred.

13 I do ask the Court to issue lifetime-supervised
14 release irregardless of whether this defendant receives a
15 sentence that will be in excess of his life. I do ask for
16 that lifetime supervised release with conditions that are
17 appropriate to this case.

18 And, finally, the Government does ask this Court to
19 show this man, show this defendant, show the community what
20 he's done; to give his daughters, his victims, justice; and to
21 protect the public. And I ask you to sentence him to not less
22 than 80 years.

23 THE COURT: Thank you, Mr. Cook.

24 Mr. McKinley and Mr. Russell and Ms. Cook, would you
25 come back to the podium, please.

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1 MR. McKINLEY: Your Honor, the defense requests an
2 opportunity to respond briefly to a couple of points that --

3 COURT REPORTER: I can't hear you, sir. Is your mic
4 on?

5 THE COURT: Put your mic on.

6 One minute.

7 MR. McKINLEY: Your Honor, the Government suggests
8 that the guidelines here reflect what Congress and the
9 Sentencing Commission, how seriously they take this offense.
10 Your Honor's familiar with my position on these guidelines.
11 This guideline here is almost --

12 THE COURT: I know that. That position's been
13 developed in your submissions.

14 MR. McKINLEY: All right. With respect to the
15 conduct in the other cases cited by the Government, Noel being
16 one of them, the Court of Appeals' opinion is not clear as to
17 exactly what happened in that case. They talk about the
18 molestation of an infant from the age of two to the point
19 where the child was 12 years old.

20 They spare the despicable details of that in fact
21 because those specific facts didn't factor into the issue of
22 appeal. They note that they are going to spare the reader the
23 stomach-churning details of that offense. Those offenders and
24 those cases are a far cry from what we have in this particular
25 instance.

1 Finally, with respect to the need to stack these
2 sentences consecutive to avoid giving him some kind of a pass,
3 we're not asking for a pass. They're asking for a sentence
4 that's a life sentence.

5 There is a specific statute that addresses this
6 issue of repeat offenders, and they referenced it earlier.
7 It's a two-strike statute. That's where life sentences are
8 required to be imposed and are most appropriately imposed, but
9 again, this is not the case. This is not the situation where
10 we've got conduct that's anywhere comparable to those cases
11 that they have cited in their memorandum.

12 THE COURT: It should be obvious to all, as it is
13 obvious to me, that the interests here before the Court in
14 fashioning a reasonable sentence and a just sentence and just
15 punishment have tugs and pulls in every direction, and not
16 just two directions may I say, but the lawyers have done their
17 usual eloquent job in framing those tensions and those
18 conflicts about as well as they can be positioned for the
19 Court.

20 These are issues that the Court has already
21 struggled with. I'm helped by your arguments, of course, and
22 by the articulate, really eloquent way in which you advance
23 your respective views.

24 So mindful of my obligations under 3553(a) to impose
25 a reasonable sentence, I want to speak to a couple of issues

1 and tell you how I have taken your respective adversarial
2 positions and distilled it into my own sense of what a just
3 and reasonable sentence is.

4 I want to underscore primarily for people who are
5 not used to making these judgments every day, those people in
6 the gallery, that this is the way in which the Court's
7 empowered and expected and entrusted with the obligation to
8 essentially sort it all out.

9 So to the extent that I pull back from either
10 position, and I will, in fashioning a sentence, it's not
11 because I didn't believe you or I didn't go with you or I
12 rejected your side and credited the other side. The Court's
13 decision making is an effort to meld all of these factors, and
14 they play off against each other.

15 There are some factors about this case that redound
16 to Mr. Russell's benefit. There are some obviously that put
17 him in great jeopardy before the Court. And in that sense, I
18 guess you could say they redound to the benefit of the
19 Government's position.

20 The Government argues its position. It doesn't have
21 any other interest beyond justice.

22 So the first thing is that these photographs, the
23 four photographs, horrific as they are and offensive as they
24 are, and violative of the rights of the two victims of them,
25 were not, to use the expression that's been used otherwise in

1 this hearing today, the worst of the worst.

2 And I suppose it says something about the nature of
3 the work that the courts perform that I can say to you that
4 I've seen much worse. Juries have seen much worse. You
5 lawyers have seen much worse.

6 So they're not -- they're not in any way acceptable
7 photographs, but they're not the worst of the worst. The fact
8 that your children, Mr. Russell, were the victims, has its own
9 great egregiousness and sadness, special to that fact,
10 attributable to that fact. But you can also make a case, and
11 it's been made before in this Court by other lawyers in other
12 cases, that it is at least equally bad, and perhaps worse in
13 some ways, that people unknown to the defendant were
14 victimized. They were just random victims.

15 And there was in your activity, Mr. Russell, if you
16 hadn't stepped over the line in such a horrific way, there is,
17 in your photography, beauty, and that was the point you were
18 trying to make to me and to the jury.

19 It doesn't apply to these photographs because these
20 were beyond the pail. But I think that you actually were
21 drawn to the art of photography in very nice ways, lovely
22 ways, but not with these pictures.

23 And it occurred to me when I was thinking about you
24 and this case and what happened, that in a lot of ways, I
25 think, I think, I'm just over here trying to understand, but I

1 think that your life was a little fringy in some ways, and you
2 could have lived with that and society would have accepted
3 that -- I know it's not unlawful for you to participate in
4 nudest activities. It's a little fringy. It's not what most
5 people do. You would have to admit that. You say it about
6 yourself, it's not something you put on your resume. You wait
7 to see. And it's behavior that's not nice. It's not
8 generally-accepted behavior. But nobody's punishing you for
9 that.

10 But this tendency to live on the edge in your art
11 and in your personal behaviors and your recreational stuff,
12 had you walking on the edge. And when you overstepped, and
13 you went too far, and your interest in your daughters went too
14 far, it was no longer just a father's interests, and a
15 father's love and a father's support. You were over the line.

16 And that's what Congress does in writing the laws.
17 It says "Here's the line." And everything on this side you're
18 a free man. You can do it. People may arch an eyebrow and
19 turn up a nose and say "It's not for me," but it's lawful.

20 It's when you get over the line in that direction
21 that it's unlawful. And in this instance, it's so egregious
22 that the stiffest, toughest, most severe punishments are
23 imposed because the harm is so great.

24 It must have been -- if you have any normal feelings
25 left in you, and I think you do, I have to assume you do, it

1 had to be crushing to hear your daughter testify today and
2 during the trial, and to hear both of your daughters and to
3 hear the letters read, just crushing; if you have anything
4 normal left in you, and I think you do, as I said.

5 So it's because you moved them into that ugliness
6 that the penalties are so stiff. But is it just to assume
7 that this is the worst of the worst cases? No. It's bad
8 enough without being the worst of worst.

9 So taking into account the fact that up until these
10 events transpired, everything would have been okay in your
11 life, and then what you did not only victimized these children
12 once, it victimizes them now as you know over and over and
13 over and over and over again.

14 And it appeals to the prurient interests of other
15 sick people. And you can't change that. You can't pull that
16 back. You can't put that genie back in the bottle. That's
17 harm done that gets multiplied over and over again.

18 So we can't -- we have to deter you. We have to
19 deter others. We can't run the risk that you'll ever do this
20 again, but I don't think that I need to deter you as much as I
21 need to deter others. You need to be punished, and so there
22 will be punishment in this sentence. It can't be otherwise.

23 So here's how it seems to me. The statute says 15
24 to 30 years. With respect to Jane Doe 1, who's Jane Doe 1,
25 and was named in Counts 1 and 2, because of the other

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1 inappropriate touching, the other aggravating circumstances
2 with respect to her, and the testimony that she provided, the
3 sentence on Counts 1 and 2 will be 20 years to run
4 concurrently. So that's 240 months.

5 With respect to -- I want to get her name right,
6 Alecia?

7 MS. COOK: Jane Doe 2.

8 THE COURT: Jane Doe 2, yes, I'm sorry. I lost my
9 piece of paper.

10 The sentence can be somewhat less, but not the
11 minimum because she was your daughter. And that was violative
12 of a very special relationship, a relationship in which both
13 girls were entitled to trust you completely, and you violated
14 the trust completely.

15 So as to her two counts, 218 months, which is 18
16 years, and on her two counts, 3 and 4, those will run
17 concurrently, but the two girls' sentences will run
18 consecutively. And if I've done my math right, that's 38
19 years, and it's a total of 458 months.

20 That's my best effort to differentiate based on the
21 evidence, to fold into the decisions the harsh, ugly facts,
22 and take into account all the 3553(a) factors.

23 For you, sir, that's maybe a life sentence. Only
24 God knows that. I don't know that. It is a long time.

25 The Court will impose a life term of supervised

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1 release so that if you get out of prison at some point, you'll
2 have to march to that drum beat. You'll have to do the things
3 that are required of you by the Court in terms of supervised
4 release and will be enforced by the probation department.

5 During the period of supervised release, these will
6 be the terms and conditions: You must not commit any other
7 federal, state or local crime. You must not possess a
8 firearm, ammunition, destructive device or other dangerous
9 weapon. You must cooperate with the collection of a DNA
10 sample, and refrain from all unlawful uses of controlled
11 substances.

12 You will be suspended from drug testing mandated by
13 the Crime Control Act of 1994 because you pose a low risk of
14 future substance abuse. You must provide the probation
15 officer access to any requested financial information. You
16 may not open any new credit charges or open additional lines
17 of credit without the prior approval of the probation officer.
18 We don't want you running into financial problems that drive
19 you into criminal activity.

20 You'll be subjected to searches, and you must submit
21 to them with the assistance of other law enforcement as
22 necessary. The Government, the probation office, can execute
23 such searches of your person, vehicle, office, business,
24 residence, and property, including computer systems and
25 peripheral devices.

1 You must submit to the seizure of any contraband,
2 which means any illegal computer programs, pornography, stolen
3 property, drugs, et cetera, guns.

4 You must not possess or use a computer unless you
5 agree to comply with the computer restriction and monitoring
6 program at the direction of the probation officer. Monitoring
7 will occur on a random or regular basis.

8 You must advise the probation office of all
9 computers available to you for use. Any computer or
10 Internet-enabled device that you are found to have used and
11 not disclosed will be considered contraband and may be
12 confiscated by the probation officer. You must warn the
13 other -- or you should warn the other occupants of wherever
14 you are living or working that you are subject to such
15 monitoring software being placed on your computer because it
16 can implicate their rights as well.

17 You must not possess any pornography, erotica or
18 nude images. Any such material found in your possession will
19 be considered contraband and may be confiscated by the
20 probation officer.

21 You must participate in a program of treatment for
22 sexual disorders, including periodic polygraph examinations as
23 directed by the probation officer. The Court authorizes the
24 release of the presentence report and available psychological
25 evaluations to mental health providers approved by the

1 probation officer.

2 It is also a condition of supervised release,
3 Mr. Russell, that you not have any unsupervised contact with
4 any minor child unless that contact has been disclosed to and
5 approved by the probation officer. In determining whether to
6 approve such contacts involving members of your family, the
7 probation officer shall determine if you have notified the
8 persons having custody of such minors about this conviction,
9 and the fact that you're under supervision.

10 If this notification has been made, and if the
11 person having custody consents to the contact, then this
12 condition is not intended to prevent approval of the contact,
13 but it has to be made known in advance, disclosed to the
14 persons having custody and so forth. So all facts are known.
15 All cards are on the table.

16 You must register as a sex offender with the
17 appropriate authorities of any state in which you reside, are
18 employed or attend school. And you must not have any contact
19 with the victims, Jane Doe 1 and 2, unless they initiate the
20 contact or a qualified treatment provider deems it necessary
21 for their benefit.

22 I'm going to impose a \$5,000 fine and make the
23 payment of that fine an additional condition of supervised
24 release. That amount that remains unpaid at the commencement
25 of the term of supervised release is a condition of supervised

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1 release as well.

2 The special assessment of \$400 is mandatory. Can
3 that be paid today?

4 MS. COOK: No, Your Honor. Mr. Russell is indigent.

5 THE COURT: We'll make arrangements for that to be
6 paid through the Inmate Financial Responsibility Program
7 administered by the Bureau of Prisons because I can't waive
8 that, that particular fee.

9 Do you have a recommendation as to a place of
10 incarceration?

11 MS. COOK: Yes, we would ask that the Court make a
12 recommendation that Mr. Russell be incarcerated at the
13 institution in Butner, North Carolina, which I believe has a
14 specialized sex offender treatment unit.

15 THE COURT: I'll make that recommendation and
16 embellish it a little to say that if there's not space
17 available there, that he be permitted and enlisted, or
18 enrolled, I should say, into some other similar program at
19 another institution.

20 MS. COOK: Thank you, Judge.

21 THE COURT: That's the sentence that I intend to
22 impose. Keeping in mind the objections that you've
23 interposed, but apart from those, do you have any legal
24 objection to the way in which it's been fashioned, or do you
25 request any further elaboration of my reasons?

1 MS. COOK: We have no questions about the reasons
2 that the Court has enunciated, and no objections other than
3 those which have already been made of record.

4 THE COURT: All right.

5 How about you, Mr. Cook?

6 MR. COOK: No objections from the Government, Your
7 Honor.

8 THE COURT: All right. The sentence then that I've
9 outlined as my intended sentence, Mr. Russell, is now the
10 judgment of the Court, and a Judgment and Commitment Order
11 will be drawn up to reflect these elements as I've laid them
12 out here today, and they'll bind you in these ways until the
13 judgment's fully satisfied.

14 There was a forfeiture provision in the indictment,
15 and so the Court orders the forfeiture as well of the matters
16 referenced as being subject to the forfeiture. Let me find
17 those.

18 You must forfeit any and all visual depictions and
19 any property, real or personal, used or intended to be used in
20 relation to Counts 1 and 4. In addition, any other images
21 depicting minors in sexually-explicit situations must be
22 forfeited as well.

23 You have a right to appeal the jury's verdict and
24 you have a right to appeal the sentence that I've imposed
25 today. That right of appeal, I assume that you'll exercise.

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1 I encourage you to do that. The situation that you confront
2 here with this long sentence warrants another court's review.
3 And so your lawyers can give you advice on that. I wonder if
4 you would like me to file that Notice of Appeal through the
5 Clerk?

6 MS. COOK: Yes, Your Honor.

7 THE COURT: Would you take care of that, please
8 (indicating).

9 MS. COOK: Thank you. We had previously discussed
10 it with Mr. Russell.

11 THE COURT: All right. Otherwise, you would have
12 ten days within which to file the Notice of Appeal, but we'll
13 get it done promptly on the Court's docket so that that right
14 that you have is preserved.

15 THE DEFENDANT: Thank you, Your Honor.

16 THE COURT: That concludes the matter. I'll remand
17 you to the custody of the marshal to continue serving your
18 sentence. The time you've served to date will be credited
19 against the sentence that I've imposed. The Bureau of Prisons
20 will make that calculation, though, and tell you specifically
21 where you stand.

22 Miss Cook and Mr. McKinley, thank you very much.
23 Mr. Cook and Ms. Helart, thank you very much.

24 That concludes the matter. Good luck, Mr. Russell.

25 THE DEFENDANT: Thank you.

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(Court adjourned at 5:40 p.m.)

CERTIFICATE OF COURT REPORTER

I, Laura Howie-Walters, hereby certify that the foregoing is a true and correct transcript from reported proceedings in the above-entitled matter.

/S/LAURA HOWIE-WALTERS September 9th, 2010

LAURA HOWIE-WALTERS, RPR/CSR
Official Court Reporter
Southern District of Indiana
Indianapolis Division